TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1859.

No. 189. 87

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES EMMET CUMBERLAND, AN INFANT, BY HIS NEXT FRIEND, CHARLES J. CUMBERLAND.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MAY 24, 1859.

(16,893.)

(16,898.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 313.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES EMMET CUMBERLAND, AN INFANT, BY HIS NEXT FRIEND, CHARLES J. CUMBERLAND.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, Appellant,
vs.
CHARLES EMMET CUMBERLAND, an Infant, by His Next Friend, CHARLES J. CUMBERLAND.
No. 778.

a Supreme Court of the District of Columbia.

CHARLES EMMET CUMBERLAND, an Infant, by His Next Friend, CHARLES J. CUMBERLAND,
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY.
No. 37720. At Law.

UNITED STATES OF AMERICA, *District of Columbia*, *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration, &c.*

Filed Mar. 12, 1895.

In the Supreme Court of the District of Columbia, the — Day of March, 1895.

CHARLES EMMET CUMBERLAND, an Infant, by His Next Friend, Charles J. Cumberland, Plaintiff,
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY, Defendant.
At Law. No. 37720.

The plaintiff, who is an infant 12 years of age, by his next friend, Charles J. Cumberland, sues the defendant, for that whereas, the defendant is and was, to wit, on the 10th day of December, A. D. 1894, a body corporate, doing business within the District of Columbia, and as such was the owner of certain cars and steam-engines which it used in the transportation of passengers and freight upon a certain railroad track laid along Maryland avenue southwest, a public highway in said District of Columbia; that just about dark on the 10th day of December, 1894, the plaintiff was assisting his father,

Charles J. Cumberland, in the lighting of the lamps on said public highway, and was attempting to cross over said public highway at a place situated about 100 feet east from the east end of the Long bridge, which crosses the Potomac river at the west end of said Maryland avenue, and although said plaintiff was exercising due care and was without fault or negligence, yet he was struck by engine in the possession of and operated
2 by said defendant along and on said Maryland avenue, and was thereby violently thrown to the ground and so severely and permanently injured that his right arm was crushed and broken by the wheels of said engine passing over the said right arm of the plaintiff, and it thereby became necessary to amputate the said right arm between the elbow and shoulder; that the said engine which struck and injured said plaintiff belonged to and was operated by said defendant and its agents, and at the time of said injury to the said plaintiff said engine was being backed along and upon the track in the direction of the plaintiff at the place where said plaintiff was injured as aforesaid, and there was no light upon the rear part of said engine to indicate its approach, nor was there any signal of the coming of said engine given by said defendant or its agents, and there was no gate or fence erected alongside of said Maryland avenue at the place of said injury, so that the plaintiff was entirely unaware of any danger to him on account of crossing over said Maryland avenue or of the coming of said engine in said direction; that by reason of the reckless and grossly careless manner in which the agents of said defendant operated said engine in failing to place any light upon the rear part of said engine, which was being backed along said Maryland avenue in the direction of the plaintiff, so as to indicate the approach of said engine, and said defendant company and its agents failed to give notice in any manner whatever to the said plaintiff or to any one else of the coming of said engine along said Maryland avenue. The
3 plaintiff, although exercising due care, did not see said engine or know of its approach until he was violently struck and thrown to the ground and permanently injured, as aforesaid; that by reason of said injury so received on account of and by the grossly negligent acts of the defendant and its agents the plaintiff was dangerously and permanently injured and dismembered of his right arm between the shoulder and elbow, and suffered great anguish of body and mind.

Whereupon plaintiff brings suit and claims twenty thousand dollars damages, besides costs of suit.

W. PRESTON WILLIAMSON AND
LUTHER R. SMITH,
Attorneys for Defendant.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

W. PRESTON WILLIAMSON AND
LUTHER R. SMITH,
Attorneys for Plaintiff.

4 *Affidavit.*

Filed Mar. 12, 1895.

In the Supreme Court of the District of Columbia.

CHARLES EMMET CUMBERLAND, an Infant, by His Next Friend, Charles J. Cumberland, Plaintiff,
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY, Defendant.
} At Law. No. 37720.

Charles J. Cumberland, being duly sworn, says that Charles Emmet Cumberland, an infant, who sues by his next friend, Charles J. Cumberland, is the plaintiff in the above-entitled cause; that the said Charles Emmet Cumberland has no property of any kind in his own right, and that neither Charles Emmet Cumberland nor the affiant, because of his poverty, is able to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action; that said suit is brought against the Baltimore and Potomac Railroad Company, a body corporate, to recover damages for injuries done to the said Charles Emmet Cumberland, who sues by his next friend, by the grossly careless and wrongful acts of the defendant and its agents in backing an engine owned and operated by the defendant in the District of Columbia over the plaintiff and permanently injuring him, so that it became
5 necessary to amputate his right arm above the elbow-joint.

his
CHARLES J. x CUMBERLAND.
mark.

Witness:
A. W. MELOLING.
LUTHER R. SMITH.

Subscribed and sworn to before me this 12th day of March, 1895.
JOHN R. YOUNG, *Clerk.*

Plea.

Filed Apr. 3, 1895.

In the Supreme Court of the District of Columbia.

CHARLES EMMET CUMBERLAND, by His Next Friend, CHARLES J. CUMBERLAND,
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY.
} At Law. No. 37720.

And now comes the defendant and for plea says that it is not guilty in manner and form as plaintiff in and by his declaration hath alleged.

ENOCH TOTTEN,
Attorney for Defendant.

6 *Joinder of Issue.*

Filed Apr. 19, 1895.

In the Supreme Court of the District of Columbia.

CHARLES EMMET CUMBERLAND, an Infant, by His Next Friend, Charles J. Cumberland, Plaintiff,
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY, Defendant.
} At Law. No. 37720.

The plaintiff joins issue upon the plea of the defendant, The Baltimore and Potomac Railroad Company.

W. PRESTON WILLIAMSON,
LUTHER R. SMITH,
Attorneys for Plaintiff.

Memorandum.

November 3, 1897.—Verdict for plaintiff for $8,000.00.

7 Supreme Court of the District of Columbia.

FRIDAY, *December* 24, 1897.

Session resumed pursuant to adjournment, Justice Cole presiding.

* * * * * * *

CHARLES EMMET CUMBERLAND, an Infant, by His Next Friend, Charles J. Cumberland, Plaintiff,
vs.
BALTIMORE AND POTOMAC RAILROAD COMPANY, Defendant.
} At Law. No. 37720.

This case coming on to be heard upon the defendant's motion for a new trial, and the same having been heard, it is considered that said motion be, and the same is hereby, overruled and judgment on verdict ordered. Therefore it is considered that the plaintiff recover against the defendant eight thousand dollars ($8,000) damages, as aforesaid assessed, together with his costs of suit, to be taxed by the clerk, and have execution thereof.

Memorandum.

January 3, 1898.—October term of the court prolonged thirty days to settle bill of exceptions.

8 *Appeal.*

Filed Jan. 11, 1898.

In the Supreme Court of the District of Columbia.

CHARLES EMMET CUMBERLAND, by His Next Friend, CHARLES J. CUMBERLAND,
vs.
BALTIMORE & POTOMAC RAILROAD COMPANY. } At Law. No. 37720.

And now comes the defendant and appeals to the Court of Appeals of the District of Columbia from the judgment rendered herein on, to wit, December 24, 1897.

ENOCH TOTTEN,
Attorney for Defendant.

Citation waived.

A. S. WORTHINGTON &
W. PRESTON WILLIAMSON,
Attorneys for Plaintiff.

Memorandum.

January 11, 1898.—Appeal bond filed.

9 Supreme Court of the District of Columbia.

FEBRUARY 2, 1898.

CHARLES E. CUMBERLAND, by Next Friend, Plaintiff,
vs.
THE B. & P. R. R. Co., Defendant. } At Law. No. 37720.

Now again comes here the defendant, by its attorney, and tenders to the court here its bill of exceptions taken during the trial of this case, and prays that the same may be duly signed, sealed, and made part of the record, now for then, which is done accordingly.

Bill of Exceptions.

Filed Feb. 2, 1898.

In the Supreme Court of the District of Columbia.

CHARLES EMMERT CUMBERLAND, by His Next Friend, CHARLES J. CUMBERLAND,
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY. } Law. No. 37720.

Be it remembered that the above-entitled cause came on for trial before Mr. Justice Cole and a jury on the first day of November,

1897, Mr. A. S. Worthington and Mr. W. Preston Williamson representing the plaintiff, and Mr. Enoch Totten and Mr. J. S. Flannery representing the defendant.

And thereupon the plaintiff, CHARLES EMMERT CUMBERLAND, to maintain the issues on his part joined, testified on his own behalf as follows:

Q. What is your full name, Charles?
A. Charles Emmert Cumberland.
Q. How old are you?
A. I am 15 years old.
Q. What is your birthday? Do you remember?
A. The 26th of August.
Q. You were 15 on the 26th of last August?
A. Yes, sir.
Q. Where do you live now?
A. I live on 13½ street.
Q. Southwest?
A. Yes, sir.
Q. Do you remember the number of your house?
A. 231½ 13½ street.
Q. Were you living there in 1894 when this accident happened?
A. No, sir.
Q. Where were you living then?
A. I was living next door.
Q. You seem to have only one arm, Charles. Is that so?
A. Yes, sir.
Q. Will you hold up your stump there, if you have any, and let the jury see how much you have got left?

(The witness did as requested.)

Q. I want you to tell the jury how you lost your arm.
A. I was lighting lamps, and when I got done lighting my lamps I looked up and down both ways, and one passenger train went out, and as that one went out I started to cross, and this other one came in and knocked me down and ran over me.
Q. You have not told us where this lamp was that you had just lighted.
A. Between 14 and 13½ streets, on Maryland avenue.
Q. And on which side of Maryland avenue?
A. On the south side.
Q. How many lamps did you have to light that evening?
A. I had to light about thirty.
Q. How many had you lighted when this accident happened?
A. I had lit about twenty.
Q. Do you remember about what time you began?
A. I began at 5.48.
Q. How long would it take you to go the round?
A. It would take me about a half an hour.
Q. You had gotten about ⅔ through, had you?
A. Yes, sir.

Q. Are you sure it was 5.48?
A. No, sir; 4.48.
Q. I thought you were mistaken. What kind of a night was that?
A. It was a rainy, hazy night—a drizzly night.
Q. Was it light or dark or between?
A. It was dark.
Q. Which way was this train, which you said was passing, going?
12 A. Going south.
Q. Going towards the bridge, then?
A. Yes, sir.
Q. What kind of a train was it; a freight or a passenger train?
A. It was a passenger train.
Q. Did you have to cross the track in going north?
A. Yes, sir.
Q. How many tracks?
A. I only had to cross one.
Q. Do you know what struck you or hurt you? Did you know at the time?
A. No, sir.
Q. You said that you looked. Where were you when you looked and which way did you look?
A. I looked both ways, up Maryland avenue and down.
Q. When you say down, you mean in what direction?
A. Down, towards the north.
Q. Did you look toward the bridge?
A. Yes, sir.
Q. Was there anything in your way at that time? Could you see across the bridge, or how far down that way could you see?
A. I could see about 100 or 125 feet.
Q. What was there which prevented you from seeing further?
A. There was a telegraph box—an operator's box.
Q. When you looked down that way did you see anything?
13 A. No, sir.
Q. How far were you from the track when you looked down that way?
A. I was about twenty-five feet.
Q. And then you started to walk across the track?
A. Yes, sir.
Q. And do you remember anything further?
A. No, sir.
Q. Do you remember going upon the track?
A. No, sir.
Q. When you did look down there did you see anything coming your way?
A. No, sir.
Q. Did you hear anything?
A. No, sir.
Q. Did you hear any whistle or bell?
A. No, sir.

Q. Or warning of any kind?
A. No, sir; I didn't hear anything.
Q. Had you crossed there before?
A. Yes, sir.

And thereupon counsel for the plaintiff offered to prove by said witness that the father of witness had cautioned him to be careful in crossing the railroad tracks while lighting lamps; but counsel for the defendant objected to said proffered evidence, and the court sustained the objection.

And thereupon said witness, on direct examination, further testified:

14 Q. What is the next thing you remember?
A. The next thing I remember I was in a hospital. That is all I can remember.
Q. In what position were you when you came to your senses?
A. I was all mashed up and lying in the bed.
Q. Was your arm off then?
A. Yes, sir.
Q. Where was this lamp which you had to light next, which you were going towards?
A. That was across the street from this one, right straight across.
Q. And had you been in the habit of going over this route in the same way?
A. Yes, sir.
Q. From the lamp which you had just lighted over to the one to which you were going?
A. Yes, sir.
Q. Can you tell us whether there was any fence then along the railroad track on either side between the two lamp posts?
A. No, sir; there wasn't no fence along either side.
Q. Has there a fence been put there since?
A. Yes, sir.

And thereupon plaintiff further testified, upon cross-examination, as follows:

Q. Are you still lighting lamps?
A. Yes, sir.
Q. And at the same place?
A. No, sir.
15 Q. How long had you been engaged in lighting lamps at that time? How many months or years?
A. About a year.
Q. You had been at it about a year?
A. Yes, sir.
Q. Did you light the lamps down in that locality every evening?
A. Yes, sir.
Q. What kind of a ladder was it which you had for the purpose of lighting lamps?
A. It is a small ladder.
Q. It was a small ladder?

A. Yes, sir.
Q. How did you carry it?
A. I carried it on my shoulder.
Q. You say you had lighted a lamp on the south side of the avenue?
A. Yes, sir.
Q. Between what two streets was it?
A. Between 13½ and 14th streets.
Q. Was there only one lamp on that side of the avenue to light?
A. It was the last one I had to light on that side.
Q. But there were others which you were in the habit of lighting?
A. Yes, sir.
Q. Had you lighted them that night?
A. Yes, sir.
16 Q. Was anybody with you?
A. No, sir.
Q. Did anybody usually go with you while you lighted lamps?
A. Well, no, sir.
Q. How far did you live from that place?
A. I lived three squares from there.
Q. At what number did you live then?
A. 229 13½ street.
Q. You say that you looked both ways?
A. Yes, sir.
Q. What did you look for?
A. To see if there was any train coming either way.
Q. Where were you standing when you did this looking?
A. I was about twenty-five feet away from the track.
Q. About twenty-five feet away from the track furthest south?
A. Yes, sir.
Q. Was that the track on which you were hit?
A. Yes, sir.
Q. You say you saw a passenger train going south toward the bridge?
A. Yes, sir.
Q. And you did not see this other train coming toward you?
A. No, sir.
Q. What kind of a train was it that struck you?
A. It was a work-train.
17 Q. A work-train?
A. Yes, sir.
Q. When you started to go towards this track on which *which* this train was proceeding how fast did you go? Did you run or walk?
A. I was walking.
Q. Did you look toward the west—that is, toward the bridge—while you were walking over that twenty-five feet?
A. I don't understand you.
Q. Did you look again while you were going towards the track?
A. Yes, sir; I was looking.
Q. You looked again?

A. Yes, sir.
Q. Did you look immediately before you stepped on the track?
A. Yes, sir; I did.
Q. And you did not see the engine or the train?
A. No, sir.
Q. Which way did you look?
A. I looked both ways.
Q. Did you look towards the bridge before you stepped on the track?
A. Yes sir; I looked towards the bridge.
Q. And there was no train there?
A. No, sir.
Q. And there was no train in front of you?
A. No, sir.
18 Q. Did you hear a bell ring?
A. No, sir; I didn't hear no bell ring.
Q. You did not hear the bell ring?
A. No, sir.
Q. Do you remember whether you usually heard the bells ring down there or not?
A. No, sir.
Q. You did not hear them ring, usually?
A. No, sir.
Q. Was there anybody about there at work or doing anything at the time you went on this track?
A. I didn't see no one.
Q. You did not see any one?
A. No, sir.
Q. Did you hear anybody call out to you to look out for that train?
A. No, sir.
Q. Nobody?
A. No, sir.
Q. Were you in a hurry to get over the tracks to light that other lamp?
A. Well, I wasn't in such a big hurry.
Q. You were not in a big hurry?
A. No, sir.
Q. Did you usually walk or run from one lamp to the other?
A. I usually walked.
Q. You used to walk?
A. Yes, sir.
Q. Where was that lamp which you wanted to light next?
A. On the other side of Maryland avenue.
19 Q. On the north side of Maryland avenue?
A. Yes, sir.
Q. It was on the north side—that is, on the side opposite to where you were?
A. Yes, sir.
Q. Was it on a corner or in the middle of the square?
A. In the middle of the square.

Q. Between what two streets?
A. Between 14th and 13½.
Q. Then it was right opposite to where you were?
A. Yes, sir.
Q. At what point did you undertake to cross over the tracks; on 13½ street or below 13½ street?
A. Below 13½.
Q. About how far?
A. About 100 feet.
Q. 100?
A. About 100.
Q. Was it about half way between 13½ and 14th streets?
A. Yes, sir; it was half way.
Q. You think it was about half way?
A. Yes, sir.
Q. Fully half way?
A. Yes, sir.
Q. How far is it from you to me?
A. Well, about thirty feet.
Q. Do you know how far it is from where you are sitting clear across this room, right past me?
20 A. It is about ninety feet.
Q. Was it an engine which struck you?
A. It was an engine; yes, sir.
Q. It was an engine?
A. Yes, sir.
Q. Did it knock you down?
A. Yes, sir.
Q. Have you any recollection as to how fast it was going?
A. No, sir.
Q. You do not remember that?
A. No, sir.
Q. Do you remember anything after you were struck?
A. No, sir; I don't remember nothing.
Q. You do not remember anything?
A. No, sir.
Q. How long had it been dark that night before you started to light your lamps?
A. It had been dark a little after five o'clock.
Q. A little after five?
A. Yes, sir.
Q. What time did you say this accident occurred?
A. About 4.38.
Q. You do not remember that?
A. Yes, sir.
Q. What time did you begin to light your lamps that night?
21 A. I began to light them at 4.48.
Q. You say you had about fifty lamps to light?
A. No, sir; I had about thirty to light.
Q. How long did it usually take you to light all of those lamps?
Q. It taken me about half an hour.

Q. Were there any lights about that locality at the time you were struck?

A. No, sir.

Q. No lights at all?

A. No, sir.

Q. I believe I asked you how many lamps you had lighted. You said about twenty, did you not?

A. About twenty.

Q. You had lighted about twenty, had you?

A. Yes, sir.

Q. How far was that lamp which you did light located from the place where you were struck?

A. That was about thirty feet.

Q. Did it throw any light on the tracks?

A. No, sir; it didn't throw no light on the track.

Q. It enabled you to see the tracks, did it not?

A. Yes, sir.

Q. You could see this track before you stepped on it, could you not?

A. Yes, sir.

Q. Were there other lights about there—any electric lights about the bridge?

22 A. No, sir.

Q. You said something about there being a telegraph-house or a box there. About where was that located; can you remember?

A. That was about 100 feet from where I was struck.

Q. Which way; towards the bridge or the other way?

A. The other way.

Q. Did you ever go to school?

A. Yes, sir.

Q. What school did you attend?

A. Bradley.

Q. The Bradley school?

A. Yes, sir.

Q. How long did you go to school there?

A. I went to school about four or five years.

Q. You can read and write, of course?

A. I can't read.

Q. Can you not read?

A. No, sir.

Q. Then you cannot write, either?

A. No, sir.

Q. Can you not read at all?

A. No, sir.

Q. Did you go to school before the accident for four or five years?

A. Yes, sir.

Q. Had you been to school any since?

A. No, sir.

23 Q. Do you remember how far the nearest switch is from the place where you were struck? There is a switch there?

A. That was about eighty feet.
Q. Eighty feet?
A. Yes, sir.
Q. That would be nearly the distance across this room, according to your idea?
A. Yes, sir.
Q. Was there not a big electric light over that switch, right in the neighborhood of it?
A. Yes, sir.
Q. On a pole?
A. Yes, sir.
Q. That electric light was going, was it not?
A. No, sir.
Q. Wasn't it?
A. No, sir.
Q. It was out, was it?
A. Yes, sir.
Q. Are you sure of that?
A. Yes, sir.
Q. Might you not be mistaken about that?
A. No, sir.
Q. Then the only light which was around there that you saw was the light which you had just made yourself, the lamp that you had just lighted, and that was about thirty feet away from you?
A. Yes, sir.
24 Q. Do you know which side of the engine struck you? Had you gotten part of the way across the track, or were you struck just as you stepped upon it?
A. I think I was struck just as I stepped on the track.
Q. You were struck just as you stepped on it?
A. Yes, sir.
Q. Do you know how you fell down, which way you fell?
A. No, sir.
Q. You do not remember?
A. No, sir.
Q. You did not see this engine at all, did you?
A. No, sir.
Q. Nor did you hear it?
A. No, sir.
Q. Usually an engine and a train together make a good deal of noise passing along that part of the tracks, do they not?
A. Yes, sir.
Q. You can hear them a good ways?
A. Yes, sir.
Q. How far did you say your father's house was from this place?
A. About three squares.
Q. And you had been lighting lamps there about a year before this accident happened?
A. Yes, sir.
Q. What were you doing prior to the time when you began to light lamps?

25 A. Sir?

Q. What were you doing before you began to light lamps?

A. I was doing nothing.

Q. You were doing nothing?

A. Yes, sir.

Q. Did you ever go down to that neighborhood to play?

A. No, sir.

Q. Around the head of the bridge?

A. No, sir.

Q. How many tracks were there down there?

A. I don't know exactly.

Q. You don't know exactly?

A. No, sir.

Q. For whom were you working when you were lighting lamps at that time?

A. I was lighting for my father.

Q. For your father?

A. Yes, sir.

Q. It was his business to light the lamps?

A. Yes, sir.

Q. Where was he at this time?

A. He was lighting them, too.

Q. Do you know where?

A. He was lighting them in the northwest.

Q. In the northwest?

A. Yes, sir.

Q. Do you mean that he was lighting further towards the city than you were?

26 A. Yes, sir.

Q. He did not light the lamps all over the city, did he?

A. No, sir.

And thereupon the plaintiff testified upon redirect examination as follows:

Q. You say you were struck by a work-train. How do you know that?

A. That is what my father told me after I came out of the hospital.

Q. You do not know anything about what struck you, then, but what you have been told?

A. Yes, sir.

Q. What makes you think you were struck just as you were stepping on the track?

A. Because I knew that I was carried away, and I found myself at the hospital.

Q. I see. But my question is, How do you know that you were not struck after you got nearly across the track, for instance; or do you know anything about it?

A. No, sir; I don't know nothing about it.

Q. When you first looked for the train—looked down towards the bridge—how much of the way between this lamp that you had

just lighted and the track had you passed over? Had you gone $\frac{1}{16}$ of the way or $\frac{1}{3}$ of the way or half of the way or how much?

A. I had gotten about half of the way.

Q. You had gotten about half way?

A. Yes, sir.

27 And thereupon the plaintiff, to further maintain the issues on his part joined, called as a witness CHARLES J. CUMBERLAND, who testified that he lived at 239½ 13½ street, not 229, as the plaintiff had testified; that he was living next door, at 228, he thinks—next to 239½—at the time of the accident in question; that the witness at the time, as a lamplighter, had a right large route, and was under the weather himself, nearly blind; that he could not see, and had the plaintiff to help him out.

(The witness was proceeding to state further why he put the boy on the route by the railroad, when defendant's counsel interposed an objection; whereupon the plaintiff's counsel directed the witness not to state why he put his son down there, since defendant's counsel objected to it.)

The witness, resuming, said that on the evening of the accident he got home about half past five; that it was dark, rainy, foggy, and very cold; that about ten minutes after he got to his house he heard of the accident and went out to see his boy, and found him at the Emergency hospital between seven and eight o'clock; that when he did find the plaintiff the latter's arm had already been amputated; that he had last seen his son, the plaintiff, at 4.52 that afternoon, when they at the same time started out on their respective routes; that the plaintiff was then all right—in splendid condition; that there is just as much difference between the plaintiff now and the way he was before the accident as there is between day and night; that he was a splendid boy, and went with the plaintiff all the time, and now he never goes around with him
28 at all; that there is some other company he goes around with; that he is a different boy altogether; that he has a kind of giddiness in his head half the time; that you can tell him anything today and ask him about it tomorrow and he will forget all about it; that he was bright enough before the accident, but that since he got hurt he can't recollect hardly anything; that the witness is familiar with the locality where the accident occurred; that a person standing at the place where the plaintiff was hurt can't see across the bridge, but might see down to the switch, a distance of about 184 feet, and the draw-house was about 4 feet from the switch, on the south side of the track.

On cross-examination the witness further testified that the plaintiff was an active and bright boy at the time of the accident; that the plaintiff was born August 26, 1882; that this draw-house stood right on the end of the bridge; that it was eight feet high, and that a boy standing 150 feet from the end of the Long bridge could not see a train coming from the Long bridge, because of the obstruction caused by this house; that the plaintiff still assists witness in light-

ing lamps; that now he lights them only on the north side of Maryland avenue; that their route has been changed; that at the time of the accident witness was not engaged in any other business; that he was nearly blind and could not see and had to have the boy to help him out; that that was the reason he had the boy.

On his redirect examination the witness was asked the following question: "I wish you would tell us why it was that the boy
29 at the time of this accident was on this route where he was while you were on the north of Maryland avenue."

The witness said: "He was there, as I was telling you. I had been at the hospital blind, and I had the boy down there because it was a dangerous"——

At this point defendant's counsel again interposed, objecting to the testimony on the ground that it was immaterial and improper; whereupon plaintiff's counsel remarked that because of the objection he withdrew the question.

And thereupon the plaintiff, to further maintain the issues on his part joined, called as a witness ALBERT P. MOTLEY, who testified that he was a brakeman for the Southern Railway Company; did not know the plaintiff before he was hurt, but had seen him lighting lamps just before the accident; that he (witness) was standing at the Southern Railroad Company's crossing east of the crossing at 13½ street, watching the trains going to and from the race-track, a lot of which were passing back and forth; that he saw the boy light a lamp between 13½ and 14 street-, and then take his ladder and go towards the railroad track; that at that time witness saw no train coming towards him; that he took no further notice of him until his attention was attracted by a noise, and he looked up and saw a crowd of men about an engine attached to a work-train. On approaching he saw that they were taking the plaintiff from under the pilot of the engine, which, with the tender, had passed over him as it was running backwards; that the engine had got very near to the crossing at 13½ street, half a square from the gate, as near as he could estimate it; that he saw no headlight on
30 the engine, nor did he see any lamp or light; that he did not hear any blowing of the whistle or ringing of the bell of the engine; that he was not looking towards the bridge and was not paying any attention to any train coming up that way; that he was merely looking at the race-track trains on the main track; that he saw a passenger train bound south pass, and this latter train was about opposite the boy when he saw him going towards the track, and that it was a dark, rainy, misty evening.

And thereupon the plaintiff, to further maintain the issues on his part joined, called as a witness JOHN JOSIAH FAUNCE, who testified that he was a laborer and had known the plaintiff all his life; that he lived within two squares of him, saw him frequently, and did not consider him as bright as most boys of twelve; that he acted like a child 7 or 8 years old; that just before the accident occurred he (witness) was standing at the north end of the Long Bridge, about

300 feet from 13½ street, when the aforesaid work-train passed him, about fifteen feet away; that the locomotive was at the front end of the train, pulling it, but that it was running backwards, tender first; that there was not a regular headlight on the rear of the tender, which was then the forward end of the engine, but that there was a small white hand lamp hanging thereon, such as brakemen carry for signalling, and this was lighted and shining, but it was not a very bright light; that there was no fireman on the forward part of the engine; that he neither heard the whistle blow nor the bell ring; that this train was moving at the rate of from 12 to 15 miles per hour; that it was about twenty minutes after five
31 o'clock; that it was drizzly, misty weather, and it was getting dark.

And thereupon said witness on cross-examination further testified that he had never seen any other kind of a light on the rear of the tender of a backing engine than this one, nor one that gave a brighter light; that he did not know whether or not there was anybody on the engine; that he did not see either the engineman or fireman; that there was an electric light on a big pole at the north end of the bridge; that he had no difficulty in seeing what was going on there; that he did not see a passenger train going south, and that if one had been going south he would have noticed it; that the train may have gotten past there; that he does not usually notice the ringing of a bell; that he first saw the light on this tender when the engine was coming across the bridge, about 200 feet away; that he could have seen as far as 13½ street from where he stood, about 300 feet away; that he never timed a train, but this train was going much faster than the cable cars ran then.

On redirect examination said witness further testified that he has noticed that the shifting engines used about the yards of the company have headlights on the rear end; that the electric light was lighted and was a pretty bright light; that it was about 80 feet from the ground and had a hood over it.

On recross-examination said witness further testified that the lights on the rear of engines backing over the Long bridge are generally small, except on shifting engines; that this was like
32 the other hand lamps, only it gave a dim light; that witness thought it was not turned very high, from the light it gave.

And thereupon the plaintiff, to further maintain the issues on his part joined, called as a witness WILLIAM P. CORCORAN, who testified that he is 38 years of age; that his business is that of assistant bookkeeper; that he has *the* known the plaintiff all his life, having been in his company a great deal before the accident in question; that the witness and the plaintiff and the plaintiff's father had been out fishing a great deal, and that he in that way was thrown in the plaintiff's company; that witness was not fishing for fun, but fishing for a living, and that the plaintiff's father was also fishing for a living, and the witness was going along with him helping him out; that at times the boy would be along on these occasions; that off and on he had seen the plaintiff a good deal in other ways, be-

cause the plaintiff lived right close to the witness; that before the accident the witness lived about two doors away from where the plaintiff lived; that before that the witness lived about 6 or 7 squares away from him; that just prior to the accident the plaintiff was willing to do what he was able to do in the way of work, but witness did not think he was as bright a boy as a boy should be at his age; that at that time witness would not take him to be any smarter than a boy about 6 or 7 years old, but that witness would judge that the plaintiff was then about 10, 11, or 12 years old.

And thereupon the plaintiff, to further maintain the issues on his part joined, called as a witness Mrs. FRANCES CAMPBELL,
33 who testified that she was a school teacher; that the plaintiff had been a pupil of hers for about three months immediately before this accident in question; that at the time he was not quite as bright as most boys of his age; that he would not compare favorably in intelligence with the average boy; that he was about as smart as a boy of eight years of age; that there are other boys of eight that were much brighter than the plaintiff, and that he was as bright as some boys of eight.

And thereupon the plaintiff, to further maintain the issues on his part joined, offered in evidence the police regulations in force at the time of the said accident, which were propounded by the Commissioners of the District of Columbia in pursuance of the act of Congress approved January 26, 1897, and a joint resolution of February 26, 1892, especially section 16, the original reading of which is in the words and figures following, to wit:

"Whenever the grade of a steam railroad track is approximately even with the adjacent surface, the line of the road shall be securely closed on both sides with a substantial fence, and all grade crossings or intersection of any steam railroad tracks with streets or avenues shall be securely guarded by a suitable gate or guard, erected and maintained by the company owning or operating such track."

Then that section was amended July 26, 1894, so as to read as follows:

"Between sunset and sunrise of each day, a headlight, or other equivalent reflecting lantern to give due warning to persons
34 near or crossing steam railroad tracks of the approach of trains, locomotives or cars, shall be displayed upon the advancing end of every train of steam railroad cars, and of single steam railroad cars and locomotives not in trains, when moving in the District of Columbia. It shall be unlawful for any person to set in motion, or run or operate any train of railroad cars, single railroad cars or locomotives without the said display of such lights or lanterns."

And thereupon counsel for the plaintiff read in evidence to the jury the following section of the police regulations of the District of Columbia:

"SEC. 15. Steam cars, trains or engines shall not move upon any

street or avenue at a greater rate of speed than twelve miles an hour, and no steam car, train or engine shall be stopped or held at a street crossing or intersection so as to obstruct the passage of vehicles or foot passengers for a longer period than is needed for the passage of such steam car, train or engine at a speed of not less than five miles an hour."

And thereupon counsel for the plaintiff announced their testimony closed.

And thereupon the defendant, to maintain the issues upon its part joined, produced as a witness one GEORGE H. BROWN, who testified that he is a civil engineer by profession, and is a supervisor on the railroad of the defendant company. Witness produced a map which he said was a map of the locality where the accident in question occurred. Witness testified that the map was made
35 under his instructions, and that it was substantially a correct map.

Thereupon the map was offered in evidence by defendant's counsel. A copy of the same is hereto appended and made a part of this bill of exceptions and marked Exhibit A.

The witness, resuming his direct examination, but in response to questions propounded by plaintiff's counsel, stated that the place marked "point of accident" on the map was located by him from statements made by witnesses "whom we got hold of;" that it was made about two months before the trial; that the map did not have the fence on it. Thereupon plaintiff's counsel asked the witness to state where the fence is, and he replied, "It is just directly outside of the curb line that runs along there" (indicating on the map); and thereupon the defendant's counsel asked where the fence was on the "south side of the track," and the witness answered that it extended from 13½ street to within 7 or 8 feet of the crossing forming the entrance to the Southern railroad's "yard."

On cross-examination the witness further testified that the dotted line on the map running along north of the railroad tracks represents the curb line, which incloses the railroad company's right of way; that when the fence was put up it was put up directly outside of that curb line; that it runs down from 13½ St. to a little beyond the curb line on 14th St.; that there is an opening there, and then the fence continues on down along the railroad; that that fence was not there four years before the trial.

On his redirect examination the witness testified that from
36 13½ St. to the main-line switch is 307 feet and 6 inches; that from there down to the end of the Long bridge is about 300 feet more; that from the switch-box on the map to 13½ St. is in the neighborhood of 289 feet; that the place marked on the map "point of accident" is about 480 feet from the end of the Long bridge and 160 or 165 feet from the switch-box; that from the lamp which the defendant had lighted just before the accident to the point of the accident is about 40 feet; that the "point of accident" has been located by blood on the ties; that the distance from the

track on which the plaintiff was injured to the next track north was about 9 feet, and that the distance between the rails is 4 feet 9 inches.

The witness, being recalled and further examined on behalf of the defendant, testified that the curb is about 4 or five feet away from the rails on each side of the main track; that the distance between the two curbs between 13½ and 14th Sts. is 53 feet and the curb is about eight inches above the surface of the roadway; that at 13½ St. the tracks and curb are both flush with the street, but that half way down the square towards 14th St. the tracks are a foot and a half above the curb, making them 2 feet 2 inches above the roadway; that there is no fence on the south side of the track between 13½ and 14th Sts. at the point where the boy started to cross, and that there was no fence at that point at the time of the accident; that it would be impossible to put a fence across there on the south side on account of the location of the siding.

On the cross-examination of the witness by plaintiff's
37 counsel the following occurred:

Q. There was at that time nothing to prevent a fence being built along the north side of this track from 13½ to 14th street, was there?

A. I can't tell you. I was not here then.

Q. Is there anything put there now?

A. The fence is there now.

Q. Do you know how long after the accident this fence was put there?

A. This fence has been there a little over a year.

Q. How high a fence is that?

A. About four feet and a half.

Q. It is what you call a paling fence, is it not?

A. Yes, sir.

Q. Is it to prevent people from crossing the tracks at this point?

A. It was put there with that object.

Mr. TOTTEN: I object to that. It is not a proper question.

Mr. WORTHINGTON: I insist that it is. This regulation requires the tracks to be fenced in on both sides and to have gates at the intersections of streets, the manifest object of it being to prevent the crossing of the tracks between streets, and the streets to have watchmen and gates, so as to prevent the recurrence of just such accidents as this. As an excuse—I have allowed it to go in for what it is worth—for not having a fence at this point, Colonel Totten has asked this witness to testify that they could not
38 have a fence here on this side (indicating). Now, I ask him if there was anything to prevent the fence required on that side, and it turns out that the fence has been put up within a year, and there was nothing to prevent it.

The COURT: Does he say there is no fence on that side?

Mr. WORTHINGTON: There is none there now.

The COURT: I think that is all competent.

Mr. TOTTEN: I ask your honor to strike out the answer of the witness to that last question.

The COURT: I overrule the motion.

And thereupon counsel for the defendant then and there duly excepted, and said exception was noted at the time upon the minutes of the court.

On further cross-examination the witness said that so far as he could judge there was nothing to prevent a fence from being built on the south side of the tracks between 13½ and 14th Sts., leaving an opening in the fence for the switch; that the distance from rail to rail at the point where the accident occurred is 9 feet, and they are obliged to have a clearance of 10 feet or a clear space of 5 feet from each rail.

And thereupon the defendant, to further maintain the issues on its part joined, called as a witness CHARLES R. BUSH, who testified that he was a locomotive engineer, and that he was running the engine that struck the plaintiff, though he did not see it strike him; that he had a train of six flat cars and a caboose, and was coming from the Long bridge; that the engine was pulling the train, but was moving backwards
39 with the tender first, upon the forward end of which tender was hung a hand lamp; that this lamp gave a pretty bright light; that there was no difficulty in seeing what was going on there; that his train was moving at a rate of about eight or ten miles an hour; that the accident happened about sixty feet west of 13½ street; that it was getting dark and when he was between 14t street and the place where the accident happened he saw the for of a person moving at a brisk walk in the direction of the track, about fifty or sixty feet away; that he could not tell whether it was a man or boy; that at that time "he was watching where he was going," and the fireman was doing the same and ringing the bell; that the fireman began ringing the bell after leaving the causeway of the Long bridge; that witness was in the neighborhood of thirty feet from the boy when he saw he was coming so near the track that witness thought probably he was going to walk on it; that he then reversed the engine and applied the brake to stop; that as the person was in the act of stepping up on the ties the tender in front of witness hid him from view; that he was still walking at a brisk gait, and a couple of steps more would have put him right in the middle of the track; that he did not actually see the collision between the tender and the boy; that he stopped his train, and the first thing he did was to ask the fireman if he had struck him, and he said, "I believe we did;" that they then got down and looked for him and found him right at the point of the pilot; the engine and tender had run over him and he was lying under the truck of the first car, next to the engine, right at the point of the
40 pilot; that he was lying kind of diagonally, with his head towards the north rail; that he looked as though he had

fallen towards the north rail; that when they saw him approaching the track and after witness had concluded that he might go upon the track he rang the bell, and both witness and the fireman "hollered" to him as hard as they could; that he could not tell in which direction the boy was looking because it was getting dusk; that it was a dark, cloudy evening; that at the time the boy was struck the rear end of an Alexandria accommodation train, going south, had just passed witness's engine; that witness had been running an engine two years and a little over three months at the time the accident happened; that after he undertook to stop the train it took him a couple of seconds, hardly, to stop; that the two first tracks from the north are the north and south bound passenger tracks, and the third track is a freight track, upon which the witness's train was running.

And thereupon, on cross-examination, said witness further testified that when they stopped the front end of the engine, as they were running, was right flush with the west curb of 13½ street, right where the gate begins; that the distance in which a train can be stopped going at the rate of eight miles an hour depends very much on the condition of the track; that witness had never tried to stop a train going at that rate of speed to see in what distance it could be stopped; that if a child were on the track in front of him and he were called upon to stop the train suddenly, when it was moving at
41 a rate of eight miles an hour, he supposes it could be brought to a stop in about ninety to a hundred feet after the brakes were put on and the engine reversed; that he could not say exactly in what distance a train going at the rate of forty miles an hour could be stopped, but supposes that it would take probably a couple of hundred yards; that on this night, after he put on his brakes and reversed his engine, it came to a stop within between eighty and ninety feet; that when his train came to a stop he called to the gateman, who was standing at his gates at 13½ street, and asked him if they had struck that person; that they were not sure at that time that they had struck the person or whatever it was; that the gateman said, "I think you did," or "You did;" that the witness was on the north side of the cab and the fireman was on the south side; that he supposes that there was nothing to prevent the fireman from looking out on the south side of the engine and seeing the boy get on the track; that witness did not know whether it was a boy or girl, or man or woman; that he knew it was a person of some kind; that the light they had in front did not throw an illumination on the object so that he could tell whether it was a man or child; that when he first saw the boy he was about fifteen feet from the track, and witness himself was about sixty feet away from him in a straight line when he first saw him; that at that time witness did not put on his brakes and reverse his engine; that he waited until he saw he was approaching near the track and thought he would stop; that he thought he would stop before he got on the track; that there was not light enough to see whether this boy had
42 anything in his hand; that when the track is wet they can stop much quicker by the use of sand; that when they are running backwards they cannot run sand under the drivers

of the engine, but they can under the train; that the lever by which sand is applied to the track is right by where he stands; that he does not remember whether he used sand on this occasion or not.

And thereupon the defendant, to further maintain the issues upon *his* part joined, called as a witness CHARLES H. MADDOX, who testified that he was the fireman of this train; that he was on the south side of the engine, looking out of his window towards the east and ringing the bell; that he began ringing the bell after leaving the causeway and when they were about crossing the channel, before reaching the south end of 14th street; that it was about five minutes after five o'clock, but it was not clear dark; that when he first saw the boy he was approaching the track in a brisk walk, and was about fifteen or twenty feet from the track, making his way north; that he appeared to be looking across towards the train moving on the south bound main track; that he saw he was carrying some object, but could not make out what it was; that he saw him put his foot on the end of the ties, and called the engineer's attention by "hollering;" that about the time witness "hollered" the boy was at the end of the tank on the tender; that he could see him step on the track by looking out through his window; that when he first saw him he leaned out of the window, because he expected to see him go on the track; that when witness concluded that he was going to get on
the track he was just putting his foot on the end of the
43 ties when witness "hollered" to the engineer; that the
engineer applied his brakes and reversed the engine and also "hollered;" that when he last saw him the boy was looking directly north, straight across the track; that he did not seem to take any notice of witness' train at all; it seemed as if his attention was called to the train going south, the passenger train; that when he stepped on the track he was walking along at a good gait; that there was a hand lamp on the front end of the train; that witness put it there himself; that it gave a pretty good light; that witness noticed after the accident that it was burning good; that when the train stopped he went right over to the back end of the tender and saw the lamp; that he did not get down at that time, but looked to see if he could see anything; that he thought that maybe they had struck the person and hadn't gone over him; that he then came back and got down with the engineer; that at the time they struck the boy they were going between eight and ten miles an hour.

And thereupon said witness, on cross-examination, further testified that there was no occasion to get up speed at this point because they had a light train; that he had never been on a train except on this occasion when the engineer stopped it as quickly as he could that after the engineer reversed the engine and put on his brakes it moved about the length of an engine, which is between fifty-five and sixty feet; that the boy was found between the trucks of the first car the pilot of the engine went under the car; the engine and tender
had gone entirely over him; that witness is pretty sure that
44 the boy was not dragged; that he could not say where the
front end of the tender was when they stopped; that it was

just dusk and witness could not tell whether it was a boy or girl or man or woman; that the lamp on the tender would not shine in the direction from which the person was approaching the track; that it did not give a light in every direction; that it was swinging on a hook; that it would give a light straight in front and would not to the side; that when he saw the boy step up on the ties he called to the engineer to look out, there was some one on the track; that he does not know that that was the first notice the engineer had of the boy; that witness and the engineer had said nothing to each other about the boy before witness saw the boy put his foot on the ties and called the engineer's attention to it; that witness lighted this hand lamp and hung it on the tender when the train started on the other side of the Long bridge; that after the accident the first thing he did was to see whether the lamp was still there; that he did not go particularly to see if the lamp was there, because he knew it was there, but also went to see if the boy, or whatever it was that had been struck, had been knocked down; that the headlight of the engine was lighted; that this headlight was pretty bright and was throwing its light towards the rear on the first car.

And thereupon the defendant, to further maintain the issues upon its part joined, called as a witness ROBERT DEAVERS, who testified that he was the conductor of the train, but was in the caboose, the last car in the rear of the train, and did not see the accident.

45 Said witness, on cross-examination, further testified that there was a hand brake on the caboose which was operated by the flagman; that when the hand brakes are used they are operated in response to a whistle from the engine; that there was no air brake on the caboose; that on this occasion he thinks there was no whistle to use the hand brake and he did not see the flagman putting on the brake; that in the case of an emergency like this they can't apply the hand brake; they do not have time; that when he noticed the jar made by applying the air brakes his caboose was just coming off of the bridge at 14th street; that he did not notice where it was when the train stopped; that it appeared to him to have gone about sixty feet from the time he heard the jar made by the air brakes until the train actually stopped.

And thereupon the defendant, to further maintain the issues upon its part joined, called as a witness EDWARD F. ROBY, who testified that he was a switchman at 14th street and Maryland avenue at the time of the accident; that he was standing in front of the switch-house, which is about ten feet from the switch and about seventy feet from where the boy was struck; that he had known the boy through life and had known his father; that the boy had been engaged in lighting lamps down in that locality for about a year and was in the habit of crossing the tracks at that point; that when he first saw the boy the engine and one car had passed witness and the boy was then about ten feet from the track, going towards it; that he called to him just as soon as he saw him

going towards the track; that the boy did not turn his head
46 or indicated that he heard witness call; that he kept looking straight across the track; that the Alexandria local was just going out; that witness cannot say whether the boy looked at the incoming train, but he thinks his eyes were on the outgoing train; that witness called to him half a dozen times; that there were some vehicles on the street coming from Jackson City, the race track; the bell was being rung by the fireman; that Mr. Thomas, a friend of his, who was standing there with him, also "hollered" at the boy; that he called to him pretty loud; that Thomas "hollered" as loud as did witness, and both, witness thinks, "hollered" loud enough for the boy to hear; that there was a hand lamp swinging on the advancing end of the tender; the headlight was lit and was turned towards the train; that the train was running about eight miles an hour; that he could not tell what the engineer did about stopping the train; that the boy put his foot over the track nearest to him when the tender of the engine was right on top of him; he supposes it was about a foot from him; that he did not see the engine strike the boy, because he passed out of his sight; that he was walking pretty fast, and witness thinks he had the ladder across his right shoulder; that witness thinks about an engine and one car and a half of another one had passed him when they went over the boy; that the electric light near the switch-box was burning, and this light throws a pretty bright light; that you can read a newspaper by it anywhere around there; that at the time of the accident there was no fence between 13½ and 14th street on either side of the track; that there is a fence now on the north side of the
47 track, but not on the south side, at the point where the accident happened.

And thereupon said witness, on cross-examination, further testified that when the engine passed him he noticed that the fireman was ringing his bell; that he did not see the engineer who was on the opposite side; that the cab window was open and the fireman had his head on the side, looking out straight up the track; that the switch-box, where witness was, is on the south side of the track, and that he saw the boy as the engine passed witness; that he perceived distinctly that the boy was carrying a ladder; that he could see that it was not a man or woman or a girl; that he knew the little fellow without recognizing him, because he had come by there several times; that he had an overcoat on which came down somewhere about his knees; that he was not a very big boy; that at the time he first saw the boy the rear end of the Alexandria local had just passed as the work-train was coming in; that the Alexandria local had just passed and had got off on the bridge at the time the boy was struck; that he did not see the direction in which the boy's eyes were turned when he was walking towards the track just before he was struck; that if he had moved his head slightly he (witness) thinks he would not have noticed it; that there were hacks and carriages, maybe five or six, returning from the races, going up the street; that these carriages were making a noise; that the street

down there was paved with cobblestones; that these vehicles were on the north side of the street; that they were not on the
48 side where the witness was; that his switch-box is about two hundred feet in a straight line east of the electric light pole, which pole is about eighty feet high; that he can sit at his switch-box and read a newspaper by that light.

And thereupon said witness, on redirect examination, further testified that there was no obstacle between his box and the place where the boy was to obstruct the latter's view of the approaching train; that this hand lamp which was on the back of the tender gave a pretty bright light; that if the boy had turned his head towards the witness when the latter called to him he (witness) could have seen it; that there was light enough to see that.

And thereupon, on recross-examination, said witness further testified that the light on the tender was a- bright as the light in the lamp that he had in his hand, and his lamp was a pretty bright lamp; that he noticed it particularly because he wanted to see if the light was burning as bright as the lamp ought to be burning, and that the light on the tender was like the one he held in his hand.

And thereupon the defendant called as a witness JOHN R. THOMAS, who testified that he was a gate-tender for the Baltimore & Potomac Railroad Company, but at the time of the accident had no occupation; that he had known the plaintiff for a while before the accident; that at the time of the accident he was standing within ten feet of Mr. Roby, to the east of him; that he did not notice the boy until he got almost to the tracks, and Mr. Roby hollered at the same time the witness did; that when he first saw him the boy was about five feet from the track, going at a right good gait; that he
49 had a ladder with him and was carrying it on his right shoulder; that he had a little overcoat on that came down to his knees; that his head was turned towards the north, right directly opposite where he had lit the lamp; that witness hollered to him, "Hello there; look out," just as loud as he could; that he thinks that he called loud enough for the boy to hear under the circumstances; that he saw the train when it came in; that it was running at the rate of eight miles an hour—between eight and ten miles; that he was about sixty-five or seventy feet from the place where the boy was struck; that he noticed that the bells of both trains were ringing—that is, of the work-train and the Alexandria local; at the time he called to the boy the Alexandria local had just passed; that he saw the boy step over the south rail and then he lost sight of him; that he called to him seven or eight times; that he ran towards him, but did not get half the distance to him before he was struck; that Roby called to him as many times as did witness; that Roby had a hand lamp in his hand; that after the accident witness went around and found the boy under the trucks of the first car, about three feet from the cow-catcher; that witness took out the ladder and somebody else took out the boy; that when he called to the boy he thought, from the direction he was looking,

that he was watching the local train; that the boy did not look at the approaching train that struck him; that if he had looked at it there was no obstacle to prevent him seeing it; that at the time he stepped on the track he was about five feet from that portion of the engine that struck him; that at the time it was right
50 dark.

And thereupon said witness, on cross-examination, further testified that he had been in the employ of the defendant company about four months; that at the time he first saw the boy he was about five feet from the track, and does not know what he had been doing in the way of looking before that time; that when he first saw the boy the engineer and fireman were nearer him than the witness was; that there was no difficulty in seeing from where he was that the boy had a ladder; that at the time witness first saw the boy the engine had passed him; that the boy was between the railroad track and the gas lamp, and the reflection of the gas lamp enabled witness to see who the boy was; that the reflection of this gas lamp did not show on the boy's face, and if the engineer and fireman of the train had been looking at the boy they could have seen which way his face was turned as well as witness; that he heard the bells of the two trains ringing and dangling at the same time; that if anybody else besides himself and Mr. Roby shouted to the boy he did not hear him; that he did not recollect, but would not deny, telling counsel for the plaintiff at his office, in the presence of Mr. Cumberland, that the boy at the time he was struck was standing on the track, waiting for the local train to pass, when the other train came up and struck him; that if he did say it, it is not true, but that he did say on that occasion that he was satisfied that the boy could not hear him because of the noise made by the other train and the vehicles.

And thereupon, on redirect examination, said witness fur-
51 ther testified that they shouted loud enough for the boy to hear, but there was so much noise there made by the vehicles that witness does not think he heard them or he would never have gone on the track; that when he ran towards him calling to him it made no impression upon the boy; that at that time some of the vehicles were going pretty fast, rattling over the stones and making a noise that way.

And thereupon the defendant, to further maintain the issues upon its part joined, called as a witness JOHN T. PHILLIPS, who testified that at the time of the accident, in December, 1894, he was a gate-tender of the defendant company at 13½ street and Maryland avenue and had been since 1881, at different gates; that he had known the little boy who met with the accident pretty much all through his life; that he had talked to him time and time again before the accident; that he always seemed to be a pretty bright boy; that he was supple, sprightly, and got around lively; that he had seen him lighting lamps in that vicinity for about a year or so; that he was down there pretty much every night; that at the time of the accident the gates were down at 13½ Street crossing, on each side, shut-

ting the crossing off entirely; that the electric light gave a brilliant light and that he could see to read by it at his crossing; that he saw the boy just as he stepped on the track, but thought it was a girl; that it was done so quickly that he could not tell exactly whether it was a boy or a girl; that at the time he stepped on the track the engine was not over two feet from him; that the tender of
the engine had a light on it like those used for signals;
52 that it gave a tolerably fair light; that witness was standing on the north side of Maryland avenue at its intersection with 13½ street; that these two trains, the work-train and the Alexandria local, passed each other at the switch-box, right at the north end of the bridge; that he saw the light on the work-train engine half a mile; that the bell was ringing and had been ringing all the time from the time it struck the trestle-work at the north end of the bridge; that he heard calls from the direction of the switch-box, and looked around in time to see the boy step on the end of the track; that he did not hear anybody call to the boy from the engine; that the voices he heard sounded like two people were calling to him from the switch-box; that he saw two people standing down there, and that Roby, the switchman, had a light; that at the time the boy was struck his head was turned towards the north side of the street; that there was no obstacle between the boy and the approaching train that struck him; that the lights around there were sufficient to enable the boy to see everything; that he could have seen witness if he had looked at him, witness supposes; that he thinks the point where the boy was struck was about ninety feet from where he (witness) was standing; that he thinks the boy was about 200 *hundred* feet from 14th street.

And thereupon, on cross-examination, said witness further testified that at the time the engine of the construction or work train was at the switch-box the hind end of the other train was there,
and just as the work-train came to a stop the engineer asked
53 witness if he had hit anything and witness told him that he had; that the engineer did not get down off of the engine to come over to where he was, but he "hollered" to him; that he does not remember telling Mr. Cumberland a day or two after the accident that the engineer got off of his engine and came up to where he was and asked him if he had struck anything; that the engineer asked him if he had hit anything and witness told him he had; that he then got down off of *his* engine and looked around; that at that time he had stopped his engine right even with the crossing; that he did not measure the distance from his gate to where the boy was struck, he only guessed at it; that the point where the boy was struck was a little further east than the lamp that he had been lighting; that a line drawn from the lamp post on the south side of the avenue to the one on the north side would strike the track just about the point where the boy was struck; that he thought the boy was a girl because he had on a long coat; that he did not see the ladder; that when he saw the boy was going to get hit it somewhat confused him, so that he could not tell whether he saw a ladder or whether it was a boy or girl;

that he saw him when he stepped on the tracks, but, of course, he could not tell whether he looked towards the engine or not.

And thereupon, on redirect examination, said witness further testified that he shuts the gate when he sees a train a certain distance off; that on this occasion he put his gates down for the local train going south and before that had passed he saw the work-train coming and shut his gates down; that the work-train, when he
54 first saw it, was nearly half way of the bridge, which is about a mile long; that he at that time saw the light on the tender; that he could also see the reflection thrown on the cars by the headlight of the engine.

And thereupon, after counsel for the defendant had announced their testimony closed, counsel for the plaintiff showed by the foregoing witness that there was a telegraph tower near the scene of the accident (the position of which tower is indicated on the map herewith), and that the operator who was in said tower on the day of the accident was present in court.

And thereupon the defendant, to further maintain the issues upon its part, called as a witness B. J. BEAL, who testified that on the day of the accident he was the telegraph operator in the telegraph office or tower just referred to by the preceding witness and indicated on the map in evidence; that it was his duty to report trains and to give them the signals; that he did not see the accident, but heard the air brake applied on the work-train about the time he supposes it happened; that the work-train, when he first saw it, was coming out of the mouth of the bridge about half a mile away; that he supposes that it was going about six miles an hour; that the engine was coming backwards, with the tender in front; that there was a white light on the rear of the tank, and the other lights consisted of two white signals in front, headlight on the engine, and the red and green caboose lights which were at the rear of the train; that the electric light was burning at the time and there were several switch-lights which
55 are used to tell if the switch is set properly; that the switch-lights had a magnifying lens and gave a very bright light that could be seen a very long distance; that they do not make as much light around where they are located as they do straight ahead; that the electric light was on the south side of the railroad track, near the watchman's shanty at the bridge; that he heard the bell of this work-train ringing as it approached; that he noticed Mr. Roby; that it was his business to see that Roby was always out at the switch; that the locality around there was well lighted, and there was sufficient light for a person to go around there and find the switch level without a lamp; that the electric light cast a very brilliant light around there; that at the time when he heard the air brakes put down on the work-train he supposes the rear end of the local train for Alexandria had just passed him.

And thereupon said witness, on cross-examination, further testified that there were four lights in all that he had to look for, and if either of the four lights was not lit it would be his business to report

it; that when he went out after the accident he noticed most particularly that they had all the necessary lights; that the two white lights that he mentioned were on the boiler-head of the locomotive, on each side of the headlight; that they were not illuminating the track in front of the locomotive to any great extent; that the tower where the witness was standing was eight or nine feet from the extreme top to the ground, and witness' seat was directly on a
56 level with the top of the rail; that he thinks that at the time he heard the air brakes applied the rear end of the local train had passed his box, but he could not tell where the front end of the construction train was at that time; that he did not notice any calls or shouting because it was quite a noisy place there from the trains and passing vehicles; that most of the vehicles went up 14th street.

And thereupon the defendant, by its counsel, announced its testimony closed.

And thereupon the plaintiff, in rebuttal, called CHARLES J. CUMBERLAND, who testified that he had a conversation with Mr. Phillips, the gate-tender, at the corner of 13½ street and Maryland avenue, a day or two after the accident, and that Phillips told him that when the engine stopped the engineer came over to his box and asked him if he had struck something, and he said he thought he had struck a little girl.

And thereupon counsel on both sides announced their testimony closed.

And thereupon the defendant, by its counsel, upon all the evidence hereinbefore set forth, which was all the evidence given by the respective parties and which is hereby referred to and made a part hereof, prayed the court to instruct the jury to return a verdict for the defendant; but the court overruled said motion and refused to so instruct the jury; to which ruling of the court the defendant, by its counsel, then and there duly excepted, and said exception was noted at the time upon the minutes of the court.

57 And thereupon the plaintiff, by his counsel, prayed the court to instruct the jury as follows, which the court accordingly did:

1. The jury are instructed that if they find that the injuries received by the plaintiff on the evening of the 10th of December, 1894, by being run over by a locomotive on the defendant's railroad track on Maryland avenue, in the city of Washington, were caused by negligence of some person or persons in the employ of the defendant company, then the plaintiff is entitled to a verdict, unless the jury further find from the evidence that the plaintiff's own negligence contributed to the injury; and in determining whether the injury was caused by the negligence of the defendant's employés or any of them the jury have a right to take into consideration the facts (1) that the railroad tracks at the point where the accident occurred were not protected by a fence, as required by the regulation

of the District Commissioners, which is in evidence; [(2) whether the speed of the train by which the plaintiff was injured was excessive under all the circumstances of the case;]* (2) *whether the light at the front end of the train was substantially such a light as required by the regulation of the District* of *Commissioners given in evidence or such a light as was requisite to give proper warning of the approach of the train;* [(3) the admitted failure to have at the front end of the train a headlight or other reflecting light;]* (3) the distance passed over by the train after it struck the plaintiff before it was brought to a stop, and (4) all the evidence in the case tending to show
58 whether or not the persons in charge of the engine drawing the train were keeping a proper lookout, *and the jury will consider all the evidence in the case bearing upon these questions.*

2. In considering the question whether the plaintiff was guilty of contributory negligence the jury are instructed that the rule of the law in regard to the negligence of an adult and the rule in regard to that of an infant of tender years are quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly and cannot be visited on another. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than of one of seven, and of a child of seven less than one of twelve or fifteen. The caution required is according to the maturity and capacity of the child. That is to be determined in this case by the circumstances of this particular case.

To the granting of which prayers and each of them the defendant, by its counsel, interposed and objected; but the court overruled said objection, and said prayers were given to the jury; to which ruling of the court the defendant, by its counsel, duly excepted, and said exception was noted at the time upon the minutes of the court.

And thereupon the defendant, by its counsel, prayed the court to instruct the jury as follows, which the court accordingly did:
59 1. Unless the jury shall be satisfied from the evidence that the defendant's agents [in charge of the train which struck the plaintiff]* were guilty of negligence, the plaintiff cannot recover, and in that case the verdict must be in favor of the defendant.

Granted.

3. If the jury shall be satisfied from the evidence that just before the accident the plaintiff approached the railroad tracks of the defendant, not at a crossing, but between 13½ and 14th streets, carrying a ladder, and that he stepped on the track in front of the (having first looked and listened)
advancing engine and train without [either looking or listening]* for such engine and train, and that he was in consequence injured, [and]* he is not entitled to recover, *provided* that the agent of the defendant in charge of the engine, as soon as he discovered that the

[* Matter enclosed in brackets erased in copy.]

plaintiff was about to step upon the track, used reasonable care and diligence to avoid said accident.

Granted.

5. Every engineman in charge of a locomotive engine running on and along a railroad track in the city of Washington who sees a person walking towards such track has the right to assume that such person will not go upon such track in front of such engine, but, on the contrary, such engineman is authorized to assume that such person will stop before going into a place of danger, *provided that if the engineman shall discover that such person is about to go into a place of peril he uses due care and diligence to avoid an accident.*

Granted.

60 7. On the declaration in this cause the plaintiff, if entitled to recover at all, cannot recover for any injury except the loss of his arm and the pain and suffering incident to that injury.

Granted.

And thereupon the defendant, by its counsel, prayed the court to instruct the jury as follows:

2. If the jury shall be satisfied from the evidence that the plaintiff was a dull boy mentally, and that he was not as bright or mentally capable of taking care of himself as boys of his age usually are, and that his father sent him to light gas lamps in the locality where the accident occurred, and that it was necessary in the performance of such work to cross over several railroad tracks of the defendant after or about nightfall, and that in attempting to cross such railroad tracks at the time in question, not at a crossing, but between 13½ and 14th streets, the plaintiff received the injury complained of, he cannot recover, and the verdict must be for the defendant.

Refused. *d.*

Exception by defendant.

4. If the jury shall be satisfied from the evidence that a lighted lantern was at the time of and before the accident hanging upon the end of the tender approaching towards and nearest the plaintiff, and that the bell of the engine was kept ringing from the time the engine left "Long bridge" to the time of the accident, and that several of the employés of the defendant called to the plaintiff and warned him in a voice loud enough to be heard by him

61 before he stepped on the track in front of the advancing train, then and in that case the plaintiff, on his declaration in this cause, cannot recover, and the verdict must be in favor of the defendant.

Rejected.

Exception by defendant.

6. If the jury shall be satisfied from the evidence that a lighted lantern was suspended on the end of the engine which was being "backed" into the city before and at the time of the accident, then and in that case it is immaterial, under the declaration in the case, whether or not such lighted lantern fulfilled the requirements of the police regulations on that subject.

Rejected.

Exception by defendant.

But the court refused to grant said prayers or any of them; to which ruling of the court the defendant, by its counsel, then and there duly excepted, and said exception was noted at the time upon the minutes of the court.

62 And thereupon the court voluntarily and of its own motion instructed the jury as follows:

The COURT: Gentlemen of the jury, there has been some reference by counsel to the question of the plaintiff here. There are two persons named in the suit as plaintiffs, for the suit is brought in the name of this boy by his father, as his next friend. The names of both appear in the declaration, and, in one sense, they are both plaintiffs. The father, however, is the nominal plaintiff, while the boy is the real beneficial plaintiff, and the boy alone would be entitled to any recovery that might be had in the case. The father would have no interest in it and no right to it; but should there be a verdict for the defendant, the father is liable for costs, and the judgment for costs would be against the father. It could not be against the boy. That is the legal aspect of the case.

However, so far as the question of interest is concerned in weighing the evidence, the father would be considered as an interested party. I had occasion some days ago, perhaps, to instruct you in relation to the weight of evidence, that it was right to consider the interest a person might have or his or her situation in regard to the suit or relation to the parties to the suit, whether in the employ of them or related to them by blood or marriage; and although the father is not entitled to the recovery, still the relation which he sustains to this boy and to the suit would be proper for you to consider in determining the weight to be attached to his evidence.

You have tried several cases involving the question of negligence and contributory negligence, so I need not trouble you with
63 restating the general principles applicable to such an action; but I will proceed at once to read to you the instructions as they have been prepared by counsel in the main, with some slight modifications by the court.

The first one that I read to you is one granted on behalf of the defendant. It is numbered 1 in the defendant's series, and reads in this way:

"Unless the jury shall be satisfied from the evidence that the defendant's agents were guilty of negligence, the plaintiff cannot recover, and in that case the verdict must be in favor of the defendant."

That is the statement of the general principles in all actions for negligence. The right to a verdict depends, in the first place, upon the question whether the defendant was guilty of negligence that caused the injury; therefore, unless you find from the evidence that the defendant was guilty of negligence, your verdict would be for the defendant without inquiring any further.

But if you should find that the defendant was guilty of negligence, then, before you could determine whether your verdict should be for the plaintiff or for the defendant, you would have to

consider the further question of whether the plaintiff was guilty of contributory negligence; for if the plaintiff be guilty of contributory negligence, he cannot recover, although the defendant was guilty of negligence. In other words, the plaintiff must show, in order to be entitled to a verdict, that the defendant only was guilty of negligence, and that such negligence solely caused the accident.

64 In this connection I will read to you an instruction granted on behalf of the plaintiff, numbered 1 in the plaintiff's series. It reads in this way:

"The jury are instructed that if they find that the injuries received by the plaintiff on the evening of the 10th of December, 1894, by being run over by a locomotive on the defendant's railroad track on Maryland avenue, in the city of Washington, were caused by the negligence of some person or persons in the employ of the defendant company, then the plaintiff is entitled to a verdict, unless the jury further find from the evidence that the plaintiff's own negligence contributed to the injury; and in determining whether the injury was caused by the negligence of the defendant's employees or any of them the jury have a right to take into consideration the facts (1) that the railroad tracks at the point where the accident occurred were not protected by a fence, as required by the regulation of the District Commissioners, which is in evidence; (2) whether the light at the front end of the train was substantially such a light as required by the regulations of the District Commissioners, given in evidence, or such a light as was requisite to give proper warning of the approach of the train; (3) the distance passed over by the train after it struck the plaintiff before it was brought to a stop, and (4) all the evidence in the case tending to show whether or not the persons in charge of the engine drawing the train were keeping a proper lookout, and the jury will consider all the evidence in the case bearing upon these questions."

You will see, gentlemen, that that instruction recites four distinct suggestions, which you may consider in determining whether
65 the defendant was guilty of negligence. The first one relates to the question of the fence. It is admitted that there was no fence here at this point. The regulations of the District Commissioners, which is in evidence before you, requires generally that there shall be a fence. The court does not undertake to instruct you, and you are not to so understand the instruction, that because there was no fence there you are therefore to find that the railroad company was guilty of negligence. The court does not so instruct you, but submits to your judgment whether the fact of the fence shall be considered negligence in this case. That is a question of fact; but in determining whether the absence of the fence is negligence you are to consider that the Commissioners required it, and that they had the right to require it, and that it was not there. You have also the right to and should consider the evidence that has been given tending to show that it was impracticable to put a fence there, and you are to consider whether, under all the facts and circumstances of this case, considering the situation, the fact of not

having a fence there shall be considered negligence on the part of the railroad company. If you think it was impractical to build a fence there, and that they could not manage the road reasonably with a fence there, then it would not be negligence in not having it there, although the District Commissioners' regulations required it. The proper construction of that regulation is that the fence should be placed at all points where it was practicable to put it and not interfere with the operation of the road; and you will consider that regulation and the facts of this case in the light of that instruction I have given you. It is for you to say whether the absence
66 of the fence is negligence under the circumstances of this case.

The next point that is submitted to your consideration on the question of negligence of the defendant is whether the light at the front end of the train was substantially such a light as was required by the regulations of the District Commissioners, given in evidence, or such a light as was requisite to give proper warning of the approach of the train. The regulation of the District Commissioners required a light of a particular character. It is not absolutely necessary that the light should be exactly like the light that the District Commissioners require. If it was substantially like it, that would be a compliance with the regulations. And even if it was not substantially like it, yet if you believe from the evidence that the light was a proper and sufficient one to give warning of the approaching train, it would not be negligence simply because it did not correspond with the kind of light that the Commissioners required, the object of that regulation of the Commissioners being that railroad companies should have a light that would be sufficient in kind and character to give warning of an approaching train. And if you find that the railroad company had such a light as that it would not be guilty of negligence; but if it had a light that was insufficient to give warning of the approaching train, then it would be negligence, and that is submitted for your consideration.

And so as to the question of the distance that was passed over by the train after it struck the plaintiff. You first have to ascertain how far the train did go after it struck him, and then consider that fact after you have found it upon the question of negligence as to whether it satisfies you that they were guilty of negligence
67 in running the train because of the distance that the train ran after it struck the boy.

And, lastly, as to the evidence tending to show whether the persons in charge of the engine drawing the train were keeping a proper lookout; that is for your consideration also. The court does not undertake to tell you that they did look out, or that they did not look out, or that what lookout they kept was sufficient or insufficient. It is for you to ascertain from the evidence what lookout they actually did keep and whether that was sufficient to satisfy you that there was no negligence on the part of the railroad company in that regard.

Upon the question of whether the railroad company was guilty of negligence, the burden is upon the plaintiff to satisfy you by a

preponderance of evidence—that is to say, the evidence tending to show that the railroad company was guilty of negligence in some one or more of the particulars mentioned should be weightier in your judgment than the evidence tending to show the contrary.

After having determined whether the railroad company was guilty of negligence, if you should find that it is, it will be necessary for you to consider the question of contributory negligence. If you find that it is not, then you would be relieved from considering the question of contributory negligence, because upon finding that the railroad company was not guilty of contributory negligence, resulting in the injuries mentioned, your verdict would be for the defendant without further consideration; but if you determine against the defendant in that regard, then you would have to determine whether there was contributory negligence on the
68 part of the plaintiff before you would determine which way your verdict would be, and in that connection I read to you an instruction granted at the request of the counsel for the defendant, which is No. 3 in their series and reads in this way:

"If the jury shall be satisfied from the evidence that just before the accident the plaintiff approached the railroad track of the defendant, not at a crossing, but between 13½ and 14th streets, carrying a ladder, and that he stepped on the track in front of the advancing engine and train without having first looked and listened for such engine and train, and that he was in consequence injured, he is not entitled to recover, *provided* that the agent of the defendant, in charge of the engine, as soon as he discovered that the plaintiff was about to step upon the track, used reasonable care and diligence to avoid said accident."

Then, as bearing upon the same point, I give you another instruction at the request of counsel for the defendant, numbered 5 in their series. It reads in this way:

"Every engineman in charge of a locomotive engine running on and along a railroad track in the city of Washington who sees a person walking towards such track has the right to assume that such person will not go upon such track in front of such engine, but, on the contrary, such engineman is authorized to assume that such person will stop before going into a place of danger, *provided* that if the engineman shall discover that such person is about to go into a place of peril he uses due care and diligence to avoid an accident."

As bearing upon this question of contributory negligence
69 in this particular case, there is an instruction which has been granted at the request of counsel relating to the age of the plaintiff and what consideration is to be given to that. It is numbered 2 in the plaintiff's series of instructions, and reads in this way:

"In considering the question whether the plaintiff was guilty of contributory negligence the jury are instructed that the rule of law in regard to the negligence of an adult and the rule in regard to that of an infant of tender years are quite different. By the adult there must be given that care and attention for his own protection that

is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly and cannot be visited upon another. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than of one of seven, and of a child of seven less than of one of twelve or fifteen. The caution required is according to the maturity and capacity of a child. That is to be determined in this case by the circumstances of this particular case."

It is important to observe the whole of that instruction, gentlemen. The last clause of it is as important as any, and that is "that is to be determined in this case by the circumstances of this particular case." You are to consider, in determining whether you will hold this boy to the diligence of an adult or not, the circumstances of the case; and perhaps I should say to you, that you may not misunderstand, the court does not undertake to tell you that you are to require less of this boy than you would of an adult or that you are to treat him as an adult. That is left to you. You
70 are to say, under all the facts and circumstances of this case, whether he should be treated as an adult in this case or that he should be treated as a boy or a child having less discretion and judgment than an adult.

There has been some evidence given here tending to show that the boy is dull, and in some particulars, perhaps, has not the capacity of boys of his age, or had not at the time of this accident. That is a question for you to determine, and it might be that a boy would be dull so far as books or learning are concerned, and yet he might be an adult so far as other matters are concerned. You are not to consider him in reference to any particular thing except this accident and the circumstances of it; what were his capacity and knowledge and intelligence about railroad trains and railroad tracks, and does the evidence satisfy your mind that he had as much judgment and discretion about avoiding an accident as an adult? If it does, you should treat him as an adult. But if the evidence satisfies your mind that he had not the judgment and discretion of an adult about these particular matters, but had less, you should treat him in that way. It is all for you to determine upon that point.

If, under the instructions that have been given to you, you find for the defendant, the question of damages does not arise. But if you find for the plaintiff, then you have to consider the amount, and upon the question of the measure of damages one instruction has been granted on behalf of the defendant, which reads in this way:

71 "On the declaration of this cause the plaintiff, if entitled to recover at all, cannot recover for any injury except the loss of his arm and the pain and suffering incident to that injury."

You will remember that there was some evidence tending to show some other injuries, but, under the circumstances, I have concluded to give this instruction: That the measure of damages will relate only to the pain and suffering caused by the injury to the

arm and the loss of the arm. The elements are: the physical pain occasioned by the injury to the arm, the pain suffered while it was being cured, and the mental pain arising from and growing out of that physical injury, and then the loss of the arm, the present loss and the future loss, and the permanent injury to the party on account of the loss of the arm. Those are the elements that make up the damage.

Upon that question you are the sole judges. Of course, it is right and proper that the parties or their counsel may suggest the amount to which they think this boy is entitled, but any suggestion from counsel or parties is not evidence. It is proper for your consideration in connection with the evidence, but it is not evidence and not binding upon you. You are to use your own judgment in relation to it. The law requires that if the party is entitled to recover he should be given a full and fair compensation for his injuries and suffering, but nothing more. You would not be justified in going beyond fair compensation to him by increasing the damages by way of punishment to the railroad company. If the company is liable, it is liable simply for compensatory damages; and, as I said before, that should be full and fair, but nothing beyond that.

72 Of course, I need not say to you, gentlemen, that neither the condition of the parties here nor sympathy should enter into your consideration. You are to determine the case upon the evidence you have heard, and give such verdict as in your judgment the evidence requires at your hands.

Mr. WORTHINGTON: I wish to make one or two suggestions to your honor. In the first instruction on behalf of the defendant it is stated that "unless the jury find that there was negligence on the part of the agents of the defendant *in charge of the train*," the plaintiff could not recover. It had not occurred to me before that that would be inconsistent with that your honor said about the fence, and also with the testimony which has been given by the operator.

The COURT: Yes; that should be struck out.

Mr. WORTHINGTON: I suppose your honor meant to have it read that if we are bound to prove negligence it is on the part of the defendant's agents causing the injury. I had not noticed that or I would have called your honor's attention to it before now.

The COURT: The language is, "unless the jury shall be satisfied from the evidence that the defendant's agents in charge of the train" were guilty of negligence, &c. The words "in charge of the train" should be stricken out.

Mr. WORTHINGTON: The jury will understand that, I suppose.

The COURT: Yes; unless the jury shall be satisfied from the evidence that the defendant's agents were guilty of negligence, the plaintiff cannot recover.

Mr. WORTHINGTON: The operator, for instance, testified that it was his duty to see whether or not the proper lights were on the trains.

73 Now, I wish to except to what your honor said about the jury having a right to consider the evidence tending to show that it was impracticable to have a fence at this point on two grounds: One, that there is no evidence upon which it could be based, as the civil engineer himself testified that he did not know why there could not have been a fence there with an opening large enough for that switch; and also because of what I think your honor probably has not noticed in the testimony, that that applied only to a fence on the south of the track. There was no suggestion that the fence could not have been put on the north side of the tracks, and in fact there has been one since put there, and it is there now.

The COURT: Yes; but I had reference in what I said to the south side of the track. That is where the accident occurred.

Mr. WORTHINGTON: Still, if there had been a fence on the north side persons might have been deterred from attempting to cross from the south.

The COURT: Yes.

Mr. WORTHINGTON: Then I wish also to except to what your honor said about the regulation of the Commissioners in reference to the light required in front of the train. It seems to me that goes a little too far. I wish to except to what was said about what would be a sufficient light, even if it was not such a light as was required by the regulations.

I wish also to suggest—and I have no doubt your honor will so instruct the jury as soon as I make the suggestion—that, so far as the question of contributory negligence is concerned, the burden is on the defendant to establish that.

74 The COURT: Yes; it is on the defendant. If the jury find negligence on the part of the defendant, then the burden is on the defendant to show contributory negligence in the plaintiff in order to prevent him from recovering.

Mr. TOTTEN: But it is to be taken from all the evidence.

The COURT: They m*a*ke take it from all the evidence. They may consider the plaintiff's evidence and the evidence of the plaintiff's witnesses, as well as that of the defendant, in determining that question.

Mr. TOTTEN: If the plaintiff's evidence shows that the plaintiff was guilty of contributory negligence, that is just as well as if it was our own.

The COURT: Just as well as if it was shown by some witnesses for the defendant.

Mr. WORTHINGTON: I suppose we had better have a repetition of exceptions to the prayers. Each of us takes an exception to each of the instructions granted to the other side.

The COURT: Yes. I have marked the prayers accordingly. Wherever I have refused or granted a prayer I have marked an exception.

Mr. WORTHINGTON: We are considered as repeating the exception when it was given in the formal charge.

Mr. TOTTEN: If your honor please, I also except to the allowance of the two prayers to the plaintiff in the form in which they were

written, and also to your honor's comments, in the first place, as to the subject-matter of a light on the advancing or front end of the backing engine and tender. I do not think that question ought to be submitted to the jury at all upon the pleadings.

The COURT: You think the court should instruct the jury
75 that they cannot consider that question in determining whether there was negligence or not?

Mr. TOTTEN: Yes, sir; that the question of lights had nothing to do with it.

Mr. WORTHINGTON: That is covered by his exception.

Mr. TOTTEN: The allegation of the declaration is that there was absolutely no light on that train at all.

The COURT: Yes.

Mr. TOTTEN: I also object and except to what your honor says to the jury in reference to the different degrees of care required of an adult and of a child or one under age.

I would like to have your honor instruct the jury that if this boy did look towards this train and saw it, and then got upon the track in front of the advancing train and was hurt, he cannot recover.

Mr. WORTHINGTON: I will grant that, your honor.

The COURT: Yes; I think we all agree about that.

Mr. WORTHINGTON: I do not think the jury needs to be told that.

And thereupon the defendant, by its counsel, interposed and objected to that part of the court's charge which referred to the subject-matter of a light on the advancing or front end of the backing engine or tender, on the ground that the declaration alleged that there was absolutely no light there at all; which said part of the charge is as follows:

"The next point *is* submitted to your consideration on the question of negligence of the defendant is whether the light at the front
end of the train was substantially such a light as was re-
76 quired by the regulations of the District Commissioners given in evidence, or such a light as was requisite to give proper warning of the approach of the train. The regulation of the District Commissioners required a light of a particular character. It is not absolutely necessary that the light should be exactly like the light that the District Commissioners require. If it was substantially like it that would be a compliance with the regulations. And even if it was not substantially like it, yet if you believe from the evidence that the light was a proper and sufficient one to give warning of the approaching train, it would not be negligence simply because it did not correspond with the kind of light that the Commissioners required, the object of the regulation of the Commissioners being that railroad companies should have a light that would be sufficient in kind and character to give warning of an approaching train. And if you find that the railroad company had such a light as that, it would not be guilty of negligence, but if it had a light that was insufficient to give warning of the approaching train, then it would be negligence, and that is submitted for your consideration."

And thereupon the defendant, by its counsel, further interposed and objected to that part of the court's charge in reference to the different degrees of care required of an adult and of a child, or one under age; which said part of the charge is as follows:

"It is important to observe the whole of that instruction, gentlemen. The last clause of it is as important as any, and that is, 'that is to be determined in this case by the circumstances of this particular case.'

77 You are to consider, in determining whether you will hold this boy to the diligence of an adult or not, the circumstances of the case. And perhaps I should say to you, that you may not misunderstand, the court does not undertake to tell you that you are to require less of this boy that you would of an adult, or that you are to treat him as an adult. That is left to you. You are to say, under all the facts and circumstances of this case, whether he should be treated as an adult in this case or that he should be treated as a boy or a child, having less discretion and judgment than an adult.

There has been some evidence given here tending to show that the boy is dull and in some particulars, perhaps, has not the capacity of boys of his age, or had not at the time of the accident.

That is a question for you to determine, and it might be that a boy would be dull so far as books or learning are concerned, and yet he might be an adult so far as other matters are concerned. You are not to consider him in reference to any particular thing, except this accident and the circumstances of it; what were his capacity and knowledge and intelligence about railroad trains and railroad tracks, and does the evidence satisfy your mind that he had as much judgment and discretion about avoiding an accident as an adult? If it does, you should treat him as an adult, but if the evidence satisfies your mind that he had not judgment and discretion of an adult about these particular matters, but had less, you should treat him in that way. It is all for you to determine upon that point."

To which foregoing portions of the charge and each of them the defendant, by its counsel, duly and severally excepted, and said exceptions were noted at the time upon the minutes of the court.

78 And be it further remembered that each of the separate and several exceptions taken by counsel for the defendant to each of the separate and several rulings of the court during the progress of the said trial was so taken by counsel for the defendant then and there before the jury retired, separately and severally, and said exceptions were and each of them was then and there separately and severally duly entered upon the minutes of the justice presiding at the trial, and counsel for the defendant then and there prayed the court and now prays the court to sign and seal this bill of exceptions, to have the same force and effect as if each of the said exceptions was separately and severally set forth in a separate bill of exceptions, and — the request of said counsel for the defendant the same is accordingly signed and sealed and made a part of the

record in this cause, now for then, this 2nd day of February, A. D 1898.

CHAS. C. COLE,
Asso. Justice. [SEAL.]

Settled by counsel this 2nd day of February, A. D. 1898.

A. S. WORTHINGTON,
For Plaintiff.
ENOCH TOTTEN,
For Defendant.

(Here follows map marked p. 79.)

80 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 79, inclusive, are true copies of originals in cause No. 37720 at law, wherein Charles E. Cumberland, by his next friend, is plaintiff and The Baltimore and Potomac Railroad Company is defendant, as the same remains upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 8th day of February, A. D. 1898.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 778. The Baltimore and Potomac Railroad Company, appellant, *vs.* Charles Emmet Cumberland, an infant, by his next friend, Charles J. Cumberland. Court of Appeals, District of Columbia. Filed Feb. 11, 1898. Robert Willett, clerk.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

43 FRIDAY, *April 15th, A. D.* 1898.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, Appellant,
vs.
CHARLES EMMET CUMBERLAND, an Infant, by His Next Friend, Charles J. Cumberland. } No. 778.

The argument in the above-entitled cause was commenced by Mr. J. S. Flannery, attorney for the appellant, and was continued by Mr. A. S. Worthington, attorney for the appellee, and was concluded by Mr. Enoch Totten, attorney for the appellant.

44 THE BALTIMORE AND POTOMAC RAILROAD COMPANY, Appellant,
vs.
CHARLES EMMET CUMBERLAND, an Infant, by His Next Friend, Charles J. Cumberland. } No. 778.

Opinion.

Mr. Justice MORRIS delivered the opinion of the court:

The appellee, Charles E. Cumberland, a boy a little over twelve years of age at the time of the accident which gave occasion for this suit, was injured on the railroad track of the appellant, The Baltimore and Potomac Railroad Company, on December 10, 1894, by being knocked down and run over by an engine and tender of the company drawing a train of cars on Maryland avenue, in the city of Washington. The train had come across the Long bridge from Virginia, and was being moved northeastwardly along Maryland avenue towards the station a few minutes after five o'clock in the afternoon of the day mentioned. It was what is known as a work-train, carrying materials and laborers in the employment of the company. The engine and tender drawing the train were reversed, so that the tender was in advance of the engine, and the head of the engine was turned towards the train which it was drawing. It was a rainy, misty evening; and it was after dark, or at least getting so dark that the engineer of the engine, as he testified in the suit, was unable to distinguish objects fifty feet ahead of him. The headlight of the engine, being turned backwards toward the train, was of course invisible to the front of it; but hanging on the tender and intended as a signal was a hand lamp, such as is frequently used by the trainmen on the rear of trains and in and around the stations. As usual in such cases, the witnesses differ greatly as to the speed at which the train was moving, one witness testifying that it was at the rate of about six miles an hour, and another witness that the rate was from twelve to fifteen miles an hour.

The father of the young plaintiff, who appears in the suit as his next friend, was a lamplighter in the service of the District government, and was employed to light the gas lamps on the streets of the locality in which the accident occurred. Being incapacitated to some extent by defective or failing eyesight, he employed the boy

to help him in the performance of his duties; and the boy had been so employed for about a year before the occurrence of the accident. About five o'clock of the afternoon or evening mentioned, the boy had lit the gas lamp about the middle of the block on the south side of Maryland avenue, between Thirteen-and-a-half and Fourteenth streets; and thereupon proceeded directly across the avenue, as it seems he had been in the habit of doing, to light the corresponding lamp on the north side of the avenue, carrying on his shoulders a ladder which he used for the purpose.

At this part of the avenue there are four or five, or perhaps six, railroad tracks—two main tracks on the north side, used for passenger trains; a third to the south of these two, used for freight trains, and which was the one on which the accident occurred; south of that a track diverging eastwardly into the freight station of the Richmond and Danville Railroad Company to the south of the avenue; and still further south, and south even of the gas lamp which the boy had lit, a switch diverging from the east into a private coal yard. And it may be added that about the place of the accident, and thence westward towards Fourteenth street, the tracks begin to curve so as to reach the Long bridge at the foot of that street, and that, to the south, beyond the inner side of this curve and about the line of Fourteenth street, there is a switchman's box, which to some slight extent obstructs the view from the east of trains coming to the avenue from the bridge.

As the boy had passed or was passing the Richmond and Danville track, and was approaching the freight track, his attention was directed to a passenger train going out on the northernmost track towards the bridge. When this had passed he proceeded on his way across, and having stepped on the freight track, he was struck, knocked down, and injured by the tender attached to an engine drawing the work-train, which was coming east, and which he states that he had not seen, although he testifies that he had looked in that direction, and had listened for approaching trains, and had neither seen nor heard any. He was taken out from under the engine and taken to the hospital, his injuries resulting in the loss of his arm, which was amputated at the hospital. At the time of the accident there seems to have been considerable noise and confusion on the street, caused by the return of numerous vehicles from the races which were taking place at the time in Virginia, beyond the Long bridge; and there was considerable contrariety in the testimony as to the shouts claimed to have been made to warn the boy of his danger. And there is also considerable contrariety in the testimony with reference to the distance to which the boy could see or be seen, in consequence of the mist and darkness.

At the trial of the case in the court below the testimony on both sides seems to have been adduced without much controversy
45 as to its admissibility; and no question is presented to us in that regard. But there were introduced in evidence certain regulations made by the Commissioners of the District of Columbia, under authority of law, the reasonableness of which is not ques-

tioned, but of which the application is greatly brought in question. These regulations are the following:

"Whenever the grade of a steam-railroad track is approximately even with the adjacent surface, the line of the road shall be securely inclosed on both sides with a substantial fence, and all grade crossings or intersections of any steam-railroad tracks with streets or avenues shall be securely guarded by a suitable gate or guard, erected and maintained by the company owning or operating such track."

"Between sunset and sunrise of each day, a headlight, or other equivalent reflecting lantern to give due warning to persons near or crossing steam-railroad tracks of the approach of trains, locomotives or cars, shall be displayed upon the advancing end of every train of steam-railroad cars, and of single steam-railroad cars and locomotives not in trains, when moving in the District of Columbia. It shall be unlawful for any person to set in motion, or run or operate any train of railroad cars, single railroad cars or locomotives without the said display of such lights or lanterns."

"Steam cars, trains or engines shall not move upon any street or avenue at a greater rate of speed than twelve miles an hour, and no steam car, train or engine shall be stopped or held at a street crossing or intersection so as to obstruct the passage of vehicles or foot passengers for a longer period than is needed for the passage of such steam car, train or engine at a speed of not less than five miles an hour."

These regulations or ordinances were in force at the time of the occurrence of the accident which gave rise to this suit; and two of the three are insisted upon by the plaintiff as entering into the question of the defendant's alleged negligence. The third, however,—that in reference to the rate of speed,—seems to have been abandoned by the plaintiff in view of the insufficiency of the testimony adduced to show a violation of its provisions.

Upon the conclusion of the testimony, the whole of which is substantially set forth in the record, the defendant requested the court, upon the whole evidence, peremptorily to instruct the jury to return a verdict for the defendant; which request was refused, and the refusal is made the basis of one of the assignments of error before us.

Other requests for instructions were then presented by both sides; two on behalf of the plaintiff, which were granted, and seven on behalf of the defendant, three of which were granted and four refused. Error is assigned only on the allowance of the two instructions requested by the plaintiff, and on the refusal of two of the rejected instructions requested on behalf of the defendant, all of which will be noticed in their order.

The case was submitted to the jury; and there was a verdict for the plaintiff in the sum of $8,000, upon which there was judgment. From this judgment the defendant has prosecuted the present appeal.

1. That the defendant's request for a peremptory instruction to the jury to find a verdict for the defendant, was properly refused, is a proposition that requires no great consideration from us. Clearly there was testimony that should go to a jury both upon the question

of the defendant's negligence and upon that of the plaintiff's contributory negligence. To go on farther, on the one side, than the alleged violation of the municipal ordinances that have been cited by the defendant, a question of fact for the jury was there plainly presented. It was a question of fact for the jury, whether, with reference to the first of those ordinances, the grade of the railroad was approximately even with the adjacent surface, so as to preclude the necessity of inclosing the tracks by a fence. It is argued that, because there was a curb outside of the tracks about eight inches above the surface of the roadway of the street, and because the tracks about the place of the accident were about eighteen inches above the adjacent curb, the tracks were not approximately even with the adjacent surface, and no fence was required; and it is argued, also, that on the south side of the track a fence was impracticable on account of the divergence of the Richmond and Danville track or switch. But it is evident that the alleged elevation of the tracks above the adjacent surface was no barrier against temptation to cross the tracks, which was the very thing against which the ordinance sought to guard; for the plaintiff had been in the habit of crossing there for a year before the accident, apparently with the knowledge of the officers of the railroad company in charge at the place, and certainly without protest or objection by them, so far as the record discloses. And the record discloses the fact that, subsequently to the occurrence of the accident, the defendant constructed a fence on the north side of the track, such as was required by the ordinance, and which presents an effectual barrier against crossing the tracks. Certainly, it was more favorable to the defendant to let the question go to the jury to determine whether this disregard of the ordinance was in fact a violation of it, than for the court to decide, as a question of law, that there had not been compliance by the defendant with the ordinance; and the same observation is proper in regard to the other ordinance and the matter of a signal light on the advancing end of the engine or tender. But it is due to the appellant to say that no great reliance is placed upon this point, either in the brief or in the argument. Greater reliance is placed upon the questions raised by the other assignments of error, in connection with which the contributory negligence, with which it is sought to charge the plaintiff, may be considered.

2. The next assignment of error to be considered is that the trial court refused to hold, as matter of law, that the plaintiff was bound to exercise the same degree of care and prudence that an adult would have been bound to exercise under like circumstances.

It is not perhaps entirely correct to say, as is here implied, by the appellant, that there was any such refusal by the court below as intimated. The court was not requested by the defendant to make any such ruling; and, of course, it could not refuse what it
46 was not requested to do. But it did, on behalf of the plaintiff, and in the second instruction requested by the plaintiff, lay down the converse of the rule. That instruction is in the following words:

"In considering the question whether the plaintiff was guilty of

contributory negligence, the jury are instructed that the rule of the law in regard to the negligence of an adult and the rule in regard to that of an infant of tender years are quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly and cannot be visited on another. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than of one of seven, and of a child of seven less than one of twelve or fifteen. The caution required is according to the maturity and capacity of the child. That is to be determined in this case by the circumstances of this particular case."

And to this instruction as requested by the plaintiff and as given by the court with some explanations, which do not in any manner materially alter it, the defendant excepted; and such exception may be regarded as a sufficient basis for the assignment of error now made.

In support of the contention in this regard, the appellant cites numerous cases in which, as it claims, children, varying in age from five to thirteen years, have been held, as matter of law, guilty of contributory negligence. But it is unnecessary for us to consider those cases. One or two of them may support the appellant's proposition; and that there may be cases where, upon the clear and uncontradicted evidence, even an infant of tender years may be held, as matter of law, to the result of his own acts as negligence or contributory negligence, may be conceded, as was conceded in the case of MacMahon *v.* Northern Central Railway Co., 39 Md., 438, 449. But that is not the proposition here advanced by the appellant. The proposition here is, that for the purpose of determining whether a plaintiff, a child of the age of about twelve years, is liable to the charge of contributory negligence, he is to be held precisely to the same degree of care and prudence that an adult would have been bound to exercise under the circumstances. In answer to the proposition it seems to us to be sufficient to say that it is directly in the face of the decision of the Supreme Court of the United States in the case of Railroad Co. *v.* Gladmon, 15 Wall., 401, from the opinion in which the plaintiff's instruction excepted to has been taken *verbatim*. The rule laid down in that case was reiterated by the same court in the case of Railroad Co. *v.* Stout, 17 Wall., 660; and we are not advised that it has ever been modified in any respect. That rule we have been called upon to apply in several cases in this court. Railroad Co. *v.* Falvey, 5 App. D. C., 176; Railroad Co. *v.* Webster, 6 App. D. C., 182; Reiners *v.* W. & G. R. Co., 9 App. D. C., 19. And we must regard it as decisive of the question now raised. As we have intimated, the question raised under this assignment of error is not whether, under all the circumstances of this case, the plaintiff, as matter of law, should be adjudged to have been guilty of contributory negligence; but whether, under circumstances to be submitted to a jury for determination of the issue of contributory negligence, the jury should be instructed that there was no difference between

an adult and a child of tender years with regard to such issue. It would be error so to hold; and there was no error in holding the reverse.

3. The appellant's third assignment of error is founded upon the allowance by the trial court of the first instruction requested by the plaintiff to be given to the jury. That instruction is in the following words:

"The jury are instructed that if they find that the injuries received by the plaintiff on the evening of the 10th of December, 1894, by being run over by a locomotive on the defendant's railroad track on Maryland avenue, in the city of Washington, were caused by the negligence of some person or persons in the employ of the defendant company, then the plaintiff is entitled to a verdict, unless the jury further find from the evidence that the plaintiff's own negligence contributed to the injury; and in determining whether the injury was caused by the negligence of the defendant's employees or any of them the jury have a right to take into consideration the facts, (1) that the railroad tracks at the point where the accident occurred were not protected by a fence, as required by the regulation of the District Commissioners, which is in evidence; (2) whether the light at the front end of the train was substantially such a light as required by the regulation of the District Commissioners, given in evidence, or such a light as was requisite to give proper warning of the approach of the train; (3) the distance passed over by the train after it struck the plaintiff before it was brought to a stop, and (4) all the evidence in the case tending to show whether or not the persons in charge of the engine drawing the train were keeping a proper lookout, and the jury will consider all the evidence in the case bearing upon these questions."

To this instruction exception was taken, on the ground that it was not based upon any sufficient testimony in the case, and that it was, in part at least, inconsistent with the allegations of the declaration. That the instruction is inaptly drawn, is loose in its phraseology and grammatical construction, and is perhaps to some extent misleading, seems to be quite clear; and if it stood alone, there might be grave question whether it would not warrant a reversal of the judgment. It refers to certain suggestions for consideration as being *facts*, when only one of the matters suggested could, with any propriety of language, be so characterized; and even that one seems to assume that the failure of the railroad company to construct a fence at the place of the accident was an act of negligence *per se*, without reference to the question of its practicability or to the question whether the relation of the tracks at that place to the adjoining surface of the roadway justified the application thereto of the ordinance in regard to fencing. But the instruction does not stand alone; it was given to the jury by the court with an explanation so clear and ample as to leave no doubt of its meaning.

47 The court informed the jury that they were not to understand from the instruction that the mere failure to keep a fence at this point should be regarded as being *per se* an act of negligence; but that it was for the jury to determine, under all the circum-

stances of the case, whether it was practicable and proper to have a fence at that point. Similarly in regard to the signal light upon the engine, the jury were told that the failure of the company to provide such a light for the engine as was required by the regulation of the Commissioners would not be an act of negligence, if the light that was there was a proper and sufficient one to give warning of the approach of the train. The instruction, so construed and explained, was as favorable to the defendant as it could reasonably expect.

The third and fourth suggestions of the instruction seem to be based upon the opinion of the Supreme Court of the United States in the case of The Grand Trunk R'w'y Co. *v.* Ives, 144 U. S. 408, 427; but it is argued that there was here no testimony to support them. Precisely the same argument, on the same grounds, was made in that case; and if, in this regard, there is any difference between that case and this, we fail to find it. There the Supreme Court, by Mr. Justice Lamar, said:

"But it is claimed that the last paragraph of that portion of the charge last above quoted, referring to the question whether or not the trainmen kept a proper lookout and managed the train in a prudent and cautious manner, was erroneous, because, so it is claimed, 'there was no evidence that the train hands kept no proper lookout, &c.' This contention is also without merit. There was evidence that the ordinary signals of blowing the whistle and ringing the bell at the crossing were not given, and that the train was running at a more rapid rate than was permitted by the city ordinance. If the jury believed that evidence, they must necessarily have found that the trainmen did not keep a proper lookout, and did not manage the train in a prudent and careful manner."

4. The refusal of the trial court to grant the sixth instruction requested by the defendant is the ground for the fourth and last assignment of error that is urged upon us. That instruction was in the following words:

"If the jury shall be satisfied from the evidence that a lighted lantern was suspended on the end of the engine which was being 'backed' into the city before and at the time of the accident, then and in that case it is immaterial, under the declaration in this case, whether or not such lighted lantern fulfilled the requirements of the police regulations on that subject."

Under the exception to the refusal of this instruction, and to some extent also under the exception to the granting of the first instruction requested by the plaintiff, which we have just considered, the theory of the appellant seems to be that there was a fatal variance between the plaintiff's declaration and the proof in the case. It is argued that the allegation of the declaration is that there was no light on the rear part of the engine, which was the part that was moving forward; and that, as the testimony shows, and may be assumed to show conclusively, that there was a lighted lantern on such rear part, this element of a light is entirely eliminated from the controversy. But we do not understand the allegation of the declaration to be as claimed in this argument. The words of the

declaration are that "there was no light on the rear part of said engine to indicate its approach," and the reasonable intendment of this statement is, not that there was no light at all upon the rear part of the engine, but that there was no such light as would indicate its approach. And it was left to the jury, as already stated, to determine whether there was such a light, regardless of the fact that it may not have conformed to the regulation of the Commissioners. This was as favorable to the defendant as it had any good reason to expect; and the sixth instruction requested by the defendant was properly rejected.

We find no error in the record of this case that, in our opinion, would justify a reversal of the judgment; and that judgment must therefore be *affirmed, with costs. And it is so ordered.*

48 TUESDAY, *May 3d, A. D.* 1898.

THE BALTIMORE AND POTOMAC RAILROAD Company, Appellant,
vs.
CHARLES EMMET CUMBERLAND, an Infant, by His Next Friend, Charles J. Cumberland.
No. 778, April Term, 1898.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE MORRIS.

May 3, 1898.

49 THURSDAY, *May 5th, A. D.* 1898.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, Appellant,
vs.
CHARLES EMMET CUMBERLAND, an Infant, by His Next Friend, Charles J. Cumberland.
No. 778.

On motion of Mr. J. S. Flannery, attorney for the appellant in the above-entitled cause, it is ordered by the court that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed on giving supersedeas bond in the sum of twelve thousand dollars.

50 Know all men by these presents that we, The Baltimore and Potomac Railroad Company, as principal, and John Cassels, as surety, are held and firmly bound unto Charles Emmet Cumberland in the full and just sum of twelve thousand dollars, to be paid to the said Charles Emmet Cumberland, his certain attorney,

executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this ninth day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between Charles Emmet Cumberland, by his next friend, Charles J. Cumberland, and The Baltimore and Potomac Railroad Company, a judgment was rendered against the said The Baltimore and Potomac Railroad Company, and the said The Baltimore and Potomac Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Charles Emmet Cumberland, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said The Baltimore and Potomac Railroad Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, [SEAL.]
By ENOCH TOTTEN, *Att'y-in-fact.*
JOHN CASSELS. [SEAL.]

This bond is satisfactory.
A. S. WORTHINGTON,
Att'y for Appellee.

Approved by—
R. H. ALVEY,
Chief Justice.

[Endorsed:] No. 778. The Baltimore and Potomac Railroad Company, appellant, *vs.* Charles Emmet Cumberland, an infant, by his next friend, Charles J. Cumberland. Supersedeas bond on appeal to S. C. U. S. Court of Appeals, District of Columbia. Filed May 9, 1898. Robert Willett, clerk.

51 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between The Baltimore and Potomac Railroad Company, appellant, and Charles Emmet Cumberland, an infant, by his next friend, Charles J. Cumberland, appellee, a manifest error hath happened, to the great damage of the said appellant, as by its

complainant appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 9th day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

Seal Court Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

52 UNITED STATES OF AMERICA, *ss:*

To Charles Emmet Cumberland, an infant, by his next friend, Charles J. Cumberland, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein The Baltimore and Potomac Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 9th day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted May 10, 1898.

A. S. WORTHINGTON,
Attorney for Def'd't in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed May 10, 1898. Robert Willett, clerk.

53 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 52, inclusive, contain a true copy

of the transcript of record and proceedings of said Court of Appeals in the case of The Baltimore and Potomac Railroad Company, appellant, *vs.* Charles Emmet Cumberland, an infant, by his next friend, Charles J. Cumberland, No. 778, April term, 1898, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 24th day of May, A. D. 1898.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: Case No. 16,898. District of Columbia Court of Appeals. Term No., 31[illegible] The Baltimore and Potomac Railroad Company, plaintiff in error, *vs.* Charles Emmet Cumberland, an infant, by his next friend, Charles J. Cumberland. Filed May 31, 1898.